Supreme Court of the United States

OCTOBER TERM, 1965

No. 876

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

ACME INDUSTRIAL CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the

United States Court of Appeals

For the Seventh Circuit

No. 15045

ACME INDUSTRIAL COMPANY, *Petitioner,* **vs.** **NATIONAL LABOR RELATIONS BOARD,** *Respondent.*	On Petition to Review and Set Aside an Order of the National Labor Relations Board.

JOINT APPENDIX.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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APPENDIX.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES.

In the matter of: Acme Industrial Co., Case No. 13-CA-6396.

5/ 5/64 Charge filed.

6/30/64 Complaint and Notice of hearing, dated.

7/ 6/64 Amendment to complaint, dated.

7/ 9/64 *Respondent's answer and motion to dismiss, dated.

7/21/64 Order denying motion, dated.

8/24/64 Hearing opened.

8/24/64 Hearing closed.

10/ 7 64 Trial Examiner's decision dated.

11/19/64 General Counsel's exceptions to Trial Examiner's decision dated.

12/ 1/64 *Respondent's cross-exceptions to Trial Examiner's decision dated.

2/ 1/65 Decision and order of the National Labor Relations Board issued.

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* Petitioner herein was Respondent in proceedings before the National Labor Relations Board.

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER.

* * * * *

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

The above Employer refuses to furnish information which the undersigned Union has requested and which is material and necessary for the proper servicing and administration of the current contract between the Employer and the Union.

By these and other acts the Employer is failing and refusing to bargain within the meaning of Section 8(a)(1) and (5) of the Act.

* * * * *

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Thirteenth Region.

Acme Industrial Company, and Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.	Case No. 13-CA-6396.

COMPLAINT AND NOTICE OF HEARING.

It having been charged by Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, herein called the Union, that Acme Industrial Company, herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U. S. C. Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Thirteenth Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

I.

The original charge herein was filed on May 7, 1964, and a copy thereof was served on Respondent on or about May 11, 1964, by registered mail.

II.

(a) Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of the laws of the State of Illinois.

(b) At all times material herein, Respondent has maintained its principal office and place of business at 200 North Laflin Street, Chicago, State of Illinois, and is, and has been at all times material herein, engaged in the manufacture of tools and metal products.

(c) Respondent, in the course and conduct of its business operations during the calendar year 1963, shipped goods valued in excess of $50,000 directly to points outside the State of Illinois.

III.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

IV.

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

V.

The unit appropriate for purposes of collective bargaining between the Union and Respondent within the meaning of Section 9(b) of the Act is the unit as set forth in page 1 of the collective bargaining contract executed between the Union and the Respondent on April 23, 1963.

VI.

The Union is, and at all times since April 23, 1963, has been, the representative for the purpose of collective bargaining of the employees in the unit described above in paragraph V and by virtue of Section 9(a) of the Act has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

VII.

On or about April 1, 1964, and at all times since, the Union has requested the Respondent to furnish to the Union data relating to the removal of equipment and machines from the Respondent's plant, and copies of all grievances filed together with a list of all employees on layoff status in the appropriate unit as described in paragraph V above.

VIII.

Commencing on or about April 1, 1964, and at all times thereafter, the Respondent did refuse, and continues to refuse to bargain collectively with the Union as the exclusive collective bargaining representative of all employees in the unit described above in paragraph V, in that on or about April 1, 1964, and at all times since, Respondent has refused, and continues to refuse, to furnish to the Union data relating to the removal of equipment and machines from Respondent's plant, such information being necessary to the processing of pending grievances and the administration of the existing collective bargaining agreement.

IX.

By the acts described in paragraph VIII above, and by each of said acts, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

X.

By the acts described above in paragraph VIII, and by each of said acts, Respondent has failed and refused, and continues to fail and refuse to bargain collectively with the representative of its employees, and thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

XI.

The acts of Respondent described in paragraph VIII above, occurring in connection with the operations of Respondent described in paragraph II above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Please Take Notice that on the 24th day of August, 1964, at 10:00 A.M., C. D. S. T., in Room 826, United States Courthouse and Federal Office Building, 219 South Dearborn Street, Chicago, Illinois, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the

above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned Regional Director (in Room 881, United States Courthouse and Federal Office Building, 219 South Dearborn Street, Chicago, Illinois, 60604), acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that unless it does so, all of the allegations in the Complaint shall be deemed to be true and may be so found by the Board.

Dated at Chicago, Illinois, this 30th day of June, 1964.

/s/ Ross M. Madden,
Ross M. Madden, Regional Director,
National Labor Relations Board,
Thirteenth Region,
176 West Adams Street,
Chicago, Illinois 60603.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.
• • (Caption—13-CA-6396) • •

AMENDMENT TO COMPLAINT.

A Complaint and Notice of Hearing having been issued in the above-entitled case on June 30, 1964, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the Regional Director for the Thirteenth Region, designated by the Board's Rules and Regulations, Series 8, as amended, hereby issues this Amendment to Complaint by herewith placing a period after the words "Respondent's plant" in paragraph VII and deleting from paragraph VII the words "and copies of all grievances filed together with a list of all employees on layoff status in the appropriate unit as described in paragraph V above," so that paragraph VII, as amended, will read as follows:

VII.

On or about April 1, 1964, and at all times since, the Union has requested the Respondent to furnish to the Union data relative to the removal of equipment and machines from the Respondent's plant.

Dated at Chicago, Illinois, this 6th day of July, 1964.

/s/ William J. Cavers,
William J. Cavers,
Acting Regional Director,
National Labor Relations Board,
Thirteenth Region,
Room 881, United States Courthouse and Federal Office Building,
216 S. Dearborn Street,
Chicago, Illinois 60604.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

* * (Caption—13-CA-6396) * *

ANSWER.

Now Comes Acme Industrial Company, by Seyfarth, Shaw, Fairweather & Geraldson, its attorneys, pursuant to Section 102.20 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, for its answer to the Complaint, states and alleges:

1. Respondent admits the allegations of paragraph I of the Complaint.
2. Respondent admits the allegations of paragraph II of the Complaint.
3. Respondent admits the allegations of paragraph III of the Complaint.
4. Respondent neither admits nor denies the allegations of paragraph IV of the Complaint, said allegations not being within its knowledge.
5. Respondent neither admits nor denies the allegations of paragraph V of the Complaint, but demands strict proof thereof.
6. Respondent neither admits nor denies the allegations of paragraph VI of the Complaint, but demands strict proof thereof.
7. Respondent denies the allegations of paragraph VII, but states that on April 8, 1964, the Respondent did receive a letter from the Union asking for information concerning the removal of equipment from the Respondent's plant to aid it in the servicing of the parties' labor agreement.
8. Respondent denies each and every allegation of paragraph VIII of the Complaint, but states that on April 16, 1964, it sent a letter to the Union

stating that the requested information was unnecessary to the servicing of the parties' labor agreement.

9. Respondent denies each and every allegation of paragraph IX of the Complaint.
10. Respondent denies each and every allegation of paragraph X of the Complaint.
11. Respondent denies each and every allegation of paragraph XI of the Complaint.

Wherefore, Respondent prays that the Complaint be dismissed in its entirety.

Dated at Chicago, Illinois this 9th day of July, 1964.

Acme Industrial Company,
By: Charles J. Griffin,
Its Attorney.

Seyfarth, Shaw, Fairweather
& Geraldson,
111 West Jackson Boulevard,
Chicago, Illinois 60604,
431-9000.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.
• • (Caption—13-CA-6396) • •

MOTION OF ACME INDUSTRIAL COMPANY TO DISMISS COMPLAINT.

Pursuant to Section 102.24 of the Board's Rules and Regulations, Acme Industrial Company, Respondent in the above-entitled matter, by its attorneys, Seyfarth, Shaw, Fairweather & Geraldson, moves that the complaint and notice of hearing herein against Acme Industrial Company be dismissed in its entirety on the ground that said complaint does not allege conduct of the Respondent which is in violation of the National Labor Relations Act.

In support of this motion, Respondent submits the attached affidavit of T. J. Bellush, Industrial Relations Manager of Acme Industrial Company and Exhibits 1, 2 and 3 attached thereto.

Respectfully submitted,

Acme Industrial Company,
By: Charles J. Griffin,
Its Attorney.

Seyfarth, Shaw, Fairweather
& Geraldson,
111 West Jackson Boulevard,
Chicago, Illinois 60604,
July 9, 1964.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.
* * (Caption—13-CA-6396) * *

AFFIDAVIT OF T. J. BELLUSH MANAGER OF INDUSTRIAL RELATIONS, ACME INDUSTRIAL COMPANY.

T. J. Bellush, being first duly sworn on oath, states as follows:

1. I am and have been at all times here material, employed as Industrial Relations Manager for Acme Industrial Company, 200-222 North Laflin Street, Chicago, Illinois.

2. This affidavit is given by me in support of the motion of Acme Industrial Company to dismiss the complaint against it in National Labor Relations Board Case No. 13-CA-6396.

3. Acme Industrial Company and the International Union, United Automobile, Aerospace and Agriculture Implement Workers of America, AFL-CIO, and its Amalgamated Local Union No. 310, are parties to a collective bargaining agreement entered into on April 23, 1963, which is due to expire according to its terms on April 22, 1966. Attached hereto a Exhibit 1 is a copy of said collective bargaining agreement.

4. On April 8, 1964, the Company received a letter from the Union, copy of which is attached hereto as Exhibit 2. This letter constitutes the Union's request for information which is the subject of the unfair labor practice charge here involved.

5. On April 16, 1964, the Company replied to the Union, a copy of which reply is attached hereto as Exhibit 3.

6. Since the execution of the current labor agreement, there have been no layoffs or reductions in classification of any employee as a result of the removal of any equipment from the Company's plant.

/s/ T. J. Bellush,
T. J. Bellush,
Manager of Industrial Relations, Acme Industrial Company.

Subscribed and sworn to before me this ..... day of July, 1964.

_____
Notary Public.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.
* * (Caption—13-CA-6396) * *

MEMORANDUM OF ACME INDUSTRIAL COMPANY IN SUPPORT OF MOTION TO DISMISS COMPLAINT.

Acme Industrial Company, Respondent in the above-noted case, files this Memorandum in Support of its Motion to Dismiss the Complaint in this case.

In essence and in total, the complaint alleges that the Respondent did refuse and continue to refuse to bargain collectively with the Union by reason of its refusal to furnish the Union information relating to the removal of equipment from the Respondent's plant.

The Union's request (see Respondent's Answer, paragraph 7) noted that the information requested was "for the servicing and administration of the current contract."

The Union's unfair labor practice charge noted that the information requested was "material and necessary for

the proper servicing and administration of the current contract. . . ."

The Complaint herein alleges in paragraph VIII that "such information . . . [is] necessary to the processing of pending grievances and the administration of the existing collective bargaining agreement."

Thus, as in *Avco Mfg. Corp.*, 111 NLRB 729:

> "We are not confronted in the present case with a question involving the broad obligation of a company to furnish wage data during collective-bargaining negotiations with a union. . . ."

The issue here is whether Respondent refused information to the Union which information was necessary to its servicing and administration of the labor agreement.

As in the case of *Betty Brooks Co.*, 99 NLRB 1237, wherein it was found that the names of manufacturers to whom work was subcontracted would not have assisted in the negotiation of an agreement (and, therefore, that the refusal to submit such names did not constitute an unfair labor practice (p. 1246)), so here the information requested would in no way be necessary to the Union in its servicing of the labor agreement under the circumstances here involved. See also *Pool Mfg. Co.*, 70 NLRB 540, 550.

Section 10 of Article VI of the agreement clearly reveals that the Company's right to remove equipment is recognized and unlimited. Where a labor agreement recognized the Employer's unilateral right to subcontract, the refusal to give the Union information as to the amount of work being subcontracted was held by the General Counsel to be not violative of the Act. (Case No. SR-1437; 1961 CCH NLRB, 10,181.)

If the exercise of the Respondent's right to remove equipment resulted in the layoff or reduction of an employee, *then* the information requested might be of aid to

the Union in administering the affected employee's contractual rights, but no such result has been alleged, nor has such a result occurred.

Section 3 of Article I of the labor agreement relates to subcontracting. Not one of the questions raised by the Union would have application to the administration of that contractual provision. If subcontracting is being done, and if such subcontracting is in violation of the noted section, the fact that such subcontracting is being done with equipment previously owned by the Respondent is completely, totally, and obviously immaterial.

We are aware that unduly stringent limitations are not placed upon a Union's request for data, but where such information would not assist the Union in its servicing of the Agreement ". . . but would have resulted only in the Union's use of economic force against such third parties." (*Betty Brooks Co., supra*), then the refusal to give such data is not and should not be an unfair labor practice.

The use of the Board's facilities should not be allowed for the purpose of harassing an employer. (General Counsel Admin. Dec. Case No. 62.)

This Complaint should be dismissed in its entirety.

Respectfully submitted,

Acme Industrial Company,
By: Charles J. Griffin,
Its Attorney.

Seyfarth, Shaw, Fairweather
& Geraldson,
111 West Jackson Boulevard,
Chicago, Illinois 60604,
July 9, 1964.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.
* * (Caption—13-CA-6396) * *

ORDER DENYING MOTION TO DISMISS COMPLAINT.

Respondent has filed its motion to dismiss the complaint herein, supported by an affidavit and by certain exhibits, and the General Counsel has filed an opposition thereto, and said pleadings have been referred to the undersigned Trial Examiner for a ruling.

Upon consideration thereof, it appears from said pleadings that issues of fact are being raised which can properly be determined only in the light of evidence to be adduced at a hearing.

It is, therefore, Ordered that Respondent's motion be, and the same is hereby, denied.

George A. Downing,
Trial Examiner.

Dated: July 21, 1964.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

* * (Caption—13-CA-6396) * *

Theodore A. Lazar, Esq., for the General Counsel.

Seyfarth, Shaw, Fairweather & Geraldson, by E. Allan Kovar, and Charles J. Griffin, Esqs. of Chicago, Ill., for the Respondent.

Katz & Friedman, by Irving M. Friedman, Esq., of Chicago, Ill., for the Charging Party.

Before:

John F. Funke, Trial Examiner.

TRIAL EXAMINER'S DECISION.

Statement of the Case.

Upon a charge filed on May 7, 1964, by Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace and Agricultural Workers of America, herein Local 310 or the UAW, against Acme Industrial Company, herein Acme or the Respondent, the General Counsel issued a complaint alleging Respondent violated Section 8(a) (5) by failing to provide Local 310 with information respecting the removal of certain machinery from its Chicago plant.

The answer of the Respondent set forth the contract as a defense and denied the commission of any unfair labor practices.

This proceeding, with all parties represented was heard before me at Chicago, Illinois, on August 24, 1964. At the conclusion of the hearings the parties were given leave to submit briefs and briefs were received from the parties on September 28.

Upon my observations of the witnesses and upon the entire record herein, I make the following:

Findings and Conclusions.

I. The Business of Respondent.

Respondent is an Illinois corporation maintaining an office and principal place of business at 200 North Laflin Street, Chicago, Illinois. It is engaged in the manufacture of tools and metal products and in the course of calendar year 1963 shipped products valued in excess of $50,000 to places outside the State of Illinois.

Respondent is an employer engaged in commerce within the meaning of the Act.

II. Labor Organization Involved.

Local 310 is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices.

A. The Facts.

The complaint is specific, alleging, paragraph VIII:

> Commencing on or about April 1, 1964, and at all times thereafter, the Respondent did refuse, and continues to refuse to bargain collectively with the Union as the exclusive collective bargaining representative of all employees in the unit described above in paragraph V, in that on or about April 1, 1964, and at all times since, Respondent has refused, and continues to refuse, to furnish to the Union data relating to the removal of equipment and machines from Respondent's plant, such information being necessary to the processing of pending grievances and the administration of the existing collective bargaining agreement.

The contract between the parties dated April 23, 1964,[1] contains the following clauses which are alleged by one or the other of the parties thereto to be relevant and controlling:

Article I.

Section 3. It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company. The Company will continue to purchase components and sub-assemblies and to have other outside work done, including the making of tools and dies, where it is not economic to perform this work in the plant, or where production schedules, equipment, employee skills or other factors make it impractical to perform the work in the plant. Violation of the above will be subject to the grievance procedure.

It is understood that this Section shall have no application to subcontracts in existence at the time of the execution of this Agreement.

Article IV.

Section 1. A grievance is a difference of opinion with respect to the meaning and application of the terms of this Agreement.[2]

Article VI.

Section 10. In the event the equipment of the plant or of any department, entirely or partially, is hereafter moved to another location of the Company, employees working in the plant or in such department

1. General Counsel's Exhibit No. 3.

2. The grievance procedure provides for three steps with final and binding arbitration if agreement cannot be reached.

who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement covering production and maintenance employees at such location.

During a period beginning January 3, 1964, and running through March 3, 1964, Local 310 submitted 11 grievances (General Counsel's Exhibit Nos. 4-A through 4-K) related to the removal of machinery from Respondent's Chicago plant and to the subcontracting of work at that plant.[3]

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3. The Trial Examiner ruled, in view of the specificity of paragraph VIII of the complaint, that he would limit his decision to the failure of the Respondent to provide information respecting the removal of machinery and would not consider the failure to provide information respecting subcontracting. The following colloquy took place when the General Counsel sought to expand the issue:

Mr. Lazar: I have no further questions of this witness.

However, I'd like to reaffirm at this time my basic objection to the Trial Examiner's ruling and take exception to the ruling. I realize I have an automatic exception. However, I want it understood that the reason for my exception to the ruling with respect to testimony on subcontracting goes basically to the issue as to whether or not this information would have elicited, if granted, would have elicited such information. In other words, if the company had told the union why it was removing the machinery and where it was removing it to, then it would necessarily follow that if the company was subcontracting, the union would have had certain rights under the contract and also under the law if not expressly by virtue of the contract to demand bargaining over that subject.

Not having knowledge of that fact, the union was in no position to make any demand or to process its grievances.

Trial Examiner: I am making the same statement. Your complaint very specifically refers to information related to the removal of equipment and machines.

These grievances were pending at the time of the hearing. On April 3 Local 310 wrote Respondent (General Counsel's Exhibit No. 5) requesting information with respect to the moving of machinery from the Chicago plant. This letter read:

Dear Mr. Bellush:

The Union requests that the Company furnish the following information at the earliest possible date:

1. The approximate dates when each piece of equipment was moved out of the plant.

Now, you have had an investigation in this case. Had you found a violation of the subcontracting clause in the investigation of this charge, you could have had —you could have asked the union to amend the charge and brought all of that in.

Mr. Lazar: I might ask the witness—Mr. Bellush, were you ever permitted to talk to me during the course of investigation in this case?

Mr. Kovar: Objection.

Trial Examiner: Sustained.

Q. (By Mr. Lazar.) Did you at any time talk to any Board agent?

Mr. Kovar: I object to the question again.

Trial Examiner: Sustained.

Mr. Lazar: I should like to point out, Mr. Trial Examiner, that it is very clear that at no time during the course of this investigation was the Board permitted to receive any information from the company other than that which it voluntarily submitted.

Mr. Kovar: I will object to that comment.

Trial Examiner: Well, there is the power of subpoena if you thought they were withholding. I certainly agree with Respondent that that is an objectionable statement. Of course you are only going to get the information which Respondent volunteers to you if you don't issue a subpoena. Why should he give it to you minus a subpoena? It is an amazing thing to me that the respondents cooperate with the Board as much as they do, and this goes to respondent unions and respondent employers.

2. The place to which each piece of equipment was moved and whether such place is a facility which is operated or controlled by the Company.
3. The number of machines or equipment that was moved out of the plant.
4. What was the reason or purpose of moving the equipment out of the plant.
5. Is this equipment used for production elsewhere.

The information we are asking for is essential to the Union for the servicing and administration of the current contract.

Sincerely,

William Antalek,
President, Local 310 UAW.

Respondent replied by letter dated April 16 (General Counsel's Exhibit No. 6) reading:

Dear Mr. Antalek:

We were unaware that our relationship with your union had reached the stage when correspondence such as your letter of April 3, 1964 has become necessary. However, while we are of the opinion that it is not the scope and complexities of our relationship that dictates your use of this medium but, rather, that you are now attempting to build an unfair labor practice charge case, we shall, nevertheless, hereby respond.

We presume that your questions relate to Article VI, Section 10 of our labor agreement, although you do not specify the relevance and/or utility of the questions. We note that this section establishes a right of transfer, with certain limitations, to employees ". . . who are subject to reduction in classification or layoff

as a result of . . ." the movement of any equipment to another location of the Company. We also note that under Section 4 of Article IV of our labor agreement, grievances relating to layoffs must be filed within five (5) working days thereafter, and grievances relating to transfers must be filed within three (3) working days thereof.

We are aware of no layoffs nor of any reductions in any classification within five (5) working days prior to your letter, and we, therefore, conclude that there is no proper basis upon which your request for information may lie. You have available all the information you need to determine whether or not any employees' rights are being violated. Furthermore, the broad scope of your questions is indicative of a fishing and harassment expedition rather than a true desire for necessary information.

Please be assured that we shall continue to cooperate with your union in providing whatever proper information you request for your aid in servicing and administering our labor agreement.

This request and refusal was the only issue considered by the Trial Examiner.

B. Conclusions.

I regard the issue presented as administrative rather than juridical and, as was indicated at the hearing, it is an issue which should have properly been submitted to the Board in the first instance by way of stipulation. No question of either fact or law is in dispute. The question is solely whether the Board should, when a contract providing for binding arbitration has been executed by the parties and the dispute relates to a matter covered by the contract, intervene to police and administer the arbitration provi-

sions under the guise of preventing an unfair labor practice. I am aware that the Board and the courts, including the U. S. Supreme Court, have held that an employer is obligated to provide information relevant and necessary to enable a labor organization to bargain intelligently and that it constitutes an unfair labor practice under Section 8(a)(5) to refuse such information. My concern here is with the forum which should take cognizance of this dispute. The parties have clearly stated that it should be submitted to arbitration and the Charging Party has, in effect, attempted to use the Board as a means to discovery and inspection in furtherance of its arbitration proceeding.[4] This is not, at least as I see it, a proper function of an agency already overburdened by its caseload. Overburdened, one might add, to a point where it may fail to serve as a functional apparatus for the prevention of unfair labor practices. If the Board, as it indicated in its recent *Cloverleaf* decision[5], intends to leave the parties to arbitration where the arbitration settlement would also put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act then this appears to be such a case. This is a matter of policy for the Board and not an examiner to decide.[6] The recommendation of this examiner is in favor of self-restraint. I would not hold that the Respondent has committed an unfair labor practice by withholding information where the dispute has

4. It would appear anomalous for the Board, which does not provide for discovery and inspection in its own proceedings, to serve as an instrument for such procedure in arbitration proceedings.

5. *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB No. 133.

6. For a statement of national policy respecting the priority which should be accorded the grievance machinery provided for in a contract see *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 581.

been contemplated by the parties in making their contract and binding arbitration has been established to resolve that dispute. We are approaching a point where an employer may well wonder if he has anything to gain by engaging in collective bargaining if any disaffection with the operation of the contract on the part of contracting union may be taken to review by the Board under Section 8(a)(5).

Upon the basis of the foregoing findings and upon the entire record in this case, I make the following:

Conclusions of Law.

1. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

Recommendation.

It is recommended that the complaint be dismissed in its entirety.

Dated at Washington, D.C., Oct. 7, 1964.

John F. Funke,

Trial Examiner.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

* * (Caption—13-CA-6396) * *

DECISION AND ORDER.

On October 7, 1964, Trial Examiner John F. Funke issued his Decision in the above-entitled proceeding finding that the Respondent had not engaged in unfair labor practices as alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the General Counsel, the Charging Party and the Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and finds merit in the exceptions of the General Counsel and the Charging Party. Accordingly, the Board adopts the findings of the Trial Examiner only to the extent consistent herewith.

On April 23, 1963,[1] the Union and Respondent settled a strike which had lasted 8 months. Since the settlement, there have been between 30 and 75 employees on layoff status. On the day of the settlement, the Union and Respondent executed a collective-bargaining agreement con-

1. The Trial Examiner inadvertently found that the agreement was dated April 23, 1964, instead of April 23, 1963.

taining the following pertinent provisions which are alleged by one or the other of the parties thereto to be relevant and controlling:

Article I.

Section 3. It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company. . . .

Article VI.

Section 10. In the event the equipment of the plant or of any department, entirely or partially, is hereafter moved to another location of the Company, employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement covering production and maintenance employees at such location.

On or about January 8, 1964, the Union, upon discovering that machinery was being removed from Respondent's Chicago plant, began to seek information concerning this through its stewards. The steward would in each case ask why the machinery was being removed and where it was being moved. In each case the Respondent's foreman would state that he felt there had been no violation of the contract and that the Respondent did not feel compelled to give such information. The Union submitted 11 grievances related to the removal of machinery and to the subcontracting of work at the plant.

On April 3, 1964, William Antalek, president of the

Union, wrote a letter to Respondent requesting information concerning the approximate date when each piece of equipment was moved out of the plant; place to which the equipment was moved and whether such place is a facility which is operated or controlled by the Company; the number of machines or equipment moved out of the plant; the reason or purpose for moving the equipment; whether the equipment is used for production elsewhere. On April 16, 1964, the Respondent wrote a letter in answer and therein refused to give the requested information.

In dismissing the complaint, the Trial Examiner found that the parties clearly provided in their contract that contractual disputes should be sent to arbitration, and for that reason would leave them to the arbitration process. In so finding, the Trial Examiner viewed the scope of the complaint as being limited to the failure of Respondent to provide information respecting the removal of machinery and not the failure to provide information respecting subcontracting.

The General Counsel and Charging Party contend that the requested information is necessary to the processing of pending grievances and the administration of the existing collective-bargaining agreement.

We find, contrary to the Trial Examiner, that the complaint is sufficiently broad to include the subcontracting provision of the contract. The language of the complaint does not specifically mention nor limit the scope of the complaint to any provision of the contract. The information requested by the Union can be related to either Article I, Section 3, or Article VI, Section 10 of the agreement.

As to the information requested by the Union, Respondent contends a statutory duty to furnish information does not exist where the information sought is irrelevant to the Union's function of representing employees concerning their wages, hours, or conditions of employment. Here

the Respondent attempts to show that no employees were affected by the removal of machinery, thus making the requested information immaterial.

It is clear that Section 8(a)(5) of the Act imposes an obligation upon an employer to furnish upon request all information relevant to the bargaining representative's intelligent performance of its function.[2] Applying this principle to the instant case, it is clear, and we find contrary to the Trial Examiner, that the information sought by the Union was necessary in order to enable the Union to evaluate intelligently the grievances filed and to determine whether such grievances were meritorious, and whether to press for arbitration. The denial of such information deprives the Union of an opportunity to know whether jobs and machinery have been moved out of the plant under circumstances entitling employees, especially those in lay-off status, to follow the jobs or entitling the Union to grieve over improper subcontracting. We note that the contract does not contain a clause dealing specifically with the furnishing of information necessary and relevant to the processing of grievances or any other clause by which the union waives its statutory right to such information. The mere existence of a grievance machinery terminating in arbitration is not to be construed as a waiver of the Union's statutory right to such information.[3] Respondent was remiss in performing its statutory duty in refusing to furnish this information. We find that, by such conduct, the Respondent since on or about January 13, 1964, has failed to bargain with the Union, in violation of Section 8(a)(5) and (1) of the Act.

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2. *Timken Roller Bearing Company* v. *N. L. R. B.*, 138 NLRB 15, 325 F. 2d 746.

3. *The Fafnir Bearing Company*, 146 NLRB No. 179, page 5.

The Remedy.

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce, we shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the purposes of the Act.

It has been found that by refusing to furnish information concerning the removal of machinery from the plant, Respondent refused to bargain collectively with Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and thereby interfered with, restrained, and coerced its employees. We shall order Respondent to furnish full information concerning the removal of machinery and equipment from its plant.

Order.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Acme Industrial Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, as the exclusive bargaining representative of its employees by refusing to furnish to it or its agents information concerning the removal of equipment and machinery from its plant.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to

join or assist International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and its Local No. 310, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all of such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Furnish upon request to the Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, or its agents, information concerning the removal of equipment and machinery from its plant.

(b) Post at its plant in Chicago, Illinois, copies of the notice attached hereto marked "Appendix."[4] Copies of the said notice, to be furnished by the Regional Director for the Thirteenth Region, after being signed by a representative of the Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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4. In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

(c) Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. Feb. 1, 1965.

John H. Fanning,
Member,
Gerald A. Brown,
Member,
Howard Jenkins, Jr.,
Member,
(Seal) National Labor Relations Board,

APPENDIX.

Notice To All Employees
Pursuant To
A Decision And Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not refuse to bargain collectively with Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, as the exclusive bargaining representative of its employees by refusing to furnish to it or its agents information concerning the removal of equipment and machinery from its plant.

We Will Not in any like or related manner interfere with, restrain, or coerce its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Union, United

Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and its Local No. 310, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all of such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

We Will upon request furnish to Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, or its agents, information concerning the removal of equipment and machinery from its plant.

Acme Industrial Company,

(Employer)

Dated ..... By .....

(Representative) (Title)

This notice must remain posted for 60 days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 219 S. Dearborn St., Chicago, Illinois, 60604 (Telephone Number 828-7572), if they have any question concerning this notice or compliance with its provisions.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

Acme Industrial Company, *Petitioner,* *vs.* National Labor Relations Board, *Respondent.*	Case No. 15,045.

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Acme Industrial Company, an Illinois corporation hereinafter referred to as the "Petitioner," believing itself to be aggrieved by a certain order issued on February 1, 1965, by the National Labor Relations Board, hereinafter referred to as the "Board," in a proceeding against Petitioner appearing upon the docket of the Board as Case No. 13-CA-6396, in the matter of Acme Industrial Company and Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, pursuant to Section 10(f) of the National Labor Relations Act as amended, 61 Stat. 136, 29 U. S. C., Section 151 *et seq.* (hereinafter referred to as the "Act"), respectfully petitions this Honorable Court to review and set aside said order and, in support of its petition, Petitioner represents that:

1. On February 1, 1965, the Board issued its Decision and Order in said proceedings wherein it found and concluded that Petitioner had committed, and is committing, an unfair labor practice by refusing to bargain within the

meaning of Sections 8(a)(5) and (1) of the Act and ordered Petitioner to cease and desist therefrom as well as to take certain affirmative actions; all as set forth in the Board's Decision and Order reported as 150 NLRB No. 144. Petitioner seeks review and reversal of the Board's Decision and Order insofar as it finds and concludes that Petitioner has committed unfair labor practices.

2. This Court has jurisdiction over the parties and subject matter of this cause; Petitioner maintains its general office and production facilities in Chicago, Illinois, within the Seventh Judicial Circuit of the United States. The alleged unfair labor practices complained of in said proceeding before the Board were alleged to have been engaged in within this Judicial Circuit.

3. Insofar as it finds that Petitioner has committed unfair labor practices, the Decision and Order in said proceedings are not supported by substantial evidence or applicable law, are arbitrary and capricious, and an abuse of the Board's discretion under the Act.

Wherefore, Petitioner prays that the Court review and set aside the Decision and Order of the Board in Case No. 13-CA-6396, and grant such other relief as the rights and equities of the cause may require.

Respectfully submitted,

Acme Industrial Company,
By /s/ E. Allan Kovar,
/s/ Charles J. Griffin, Jr.,
Its Attorneys.

Seyfarth, Shaw, Fairweather
& Geraldson,
111 West Jackson Boulevard,
Chicago, Illinois, 60604
Phone: 431-9000.

1 BEFORE THE NATIONAL LABOR RELATIONS BOARD.

* * (Caption—13-CA-6396) * *

Hearing Room "B",
219 South Dearborn Street,
Chicago, Illinois,
Monday, August 24, 1964.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a.m.

Before:

John F. Funke, Trial Examiner.

Appearances:

Theodore A. Lazar, Esq., Counsel for General Counsel, National Labor Relations Board, 219 South Dearborn Street, Chicago, Illinois.

Seyfarth, Shaw, Fairweather & Geraldson, by: E. Allan Kovar, Esq. and Charles J. Griffin, Esq., 111 West Jackson Blvd., Chicago, Illinois, appearing on behalf of Acme Industrial Company, the Respondent.

Katz & Friedman, by: Irving M. Friedman, Esq., 7 South Dearborn Street, Chicago, Illinois, appearing on behalf of Local 310, UAW, AFL-CIO, Charging Party.

* * * * *

3 PROCEEDINGS.

* * * * *

6 Mr. Lazar: Mr. Trial Examiner, it has been stipulated by and between the General Counsel and the Counsel for the Respondent and I believe that Counsel for

the Charging Party will join in the stipulation that we
7 make a part of the record the Respondent's motion to dismiss the complaint which should be received as General Counsel's Exhibit No. 2.

Trial Examiner: Is it my understanding that there is excluded from the Exhibit 2 any handwriting notations made thereon?

Mr. Kovar: That is correct, sir.

Mr. Lazar: Other than the printed material.

Trial Examiner: Oh, yes.

Mr. Lazar: Right.

Trial Examiner: All right.

With that qualification, the exhibit is received in evidence.

(Whereupon, GENERAL COUNSEL'S EXHIBIT NO. 2 was received into evidence.)

• • • • •

Trial Examiner: I have one or two questions that I would like to address to the General Counsel. Has this proceeding ever gone to arbitration?

Mr. Lazar: No, not that I know of.

Mr. Kovar: No, sir.

8 Trial Examiner: Do you know why not?

Mr. Lazar: I have an idea why not.

Trial Examiner: Well, if you don't care to disclose your reasons I won't press you.

Are there any issues of fact in this case?

Mr. Lazar: Yes, there are.

Trial Examiner: There are issues that should go to the Board? We couldn't go on a stipulated record?

Mr. Lazar: Mr. Friedman has discussed this with me and we might discuss it with Counsel for the Respondent and I doubt that this is a possibility.

Trial Examiner: My review of the case has only been

a casual study of the formal documents. It's understood, however, that there is one very narrow issue in the case?

• • • • •

Mr. Lazar: I would at this time like to make a motion, Mr. Trial Examiner. I think it is a rather simple one.

I believe that in paragraph 7 of the complaint the second line from the bottom the word "data" is used.

Trial Examiner: Just a minute. Where is that, sir?

Mr. Lazar: Paragraph 7, page 2, the second line from the bottom.

Trial Examiner: Oh, yes.

Mr. Lazar: The word "data" is used.

Trial Examiner: Yes.

Mr. Lazar: If there is no objection, I should like to substitute the word "information" and wherever the word "data" appears in the complaint I should like to make the same motion.

Trial Examiner: Do you consider that a material amendment?

Mr. Lazar: No, but—

Trial Examiner: I am addressing my remarks to counsel for the Respondent.

Mr. Kovar: Inasmuch as I don't understand the difference, I have no objections.

Trial Examiner: All right. I think it is purely semantics. I think the word "information" is the word used in Board decisions in this subject and I think he would be keeping within the Board decisions. I should not speak for the General Counsel, however.

The motion is granted.

• • • • •

10 THOMAS J. BELLUSH, called by and on behalf of Counsel for General Counsel, National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Be seated and give your name and address to the Reporter, please.

The Witness: Thomas J. Bellush, 222 North Laflin, Chicago 7, Illinois, I can be contacted.

Direct Examination.

Q. (By Mr. Lazar.) Is that your home address, sir?

A. No.

Q. Please state your home address.

A. 17 South Springfield Avenue, Chicago 24, Illinois.

Q. Now, Mr. Bellush, what is your position with the company?

A. Industrial relations manager.

Q. Industrial relations manager?

A. Industrial relations manager.

Q. Did you bring with you a letter to the Acme Industrial Company: "Attention Mr. T. J. Bellush" from Mr. William Antalek, President of Local 310 of the United Auto Workers dated April 3, 1964?

A. Yes, I did.

Q. Did you also bring with you the originals of grievance Nos. 54, 57, 58, 60, 62, 63, 64, 65, 66 and 67?

11 A. Yes.

Q. Filed with your company by the union?

A. Yes, I did.

Q. Do you have those with you?

A. Yes.

Q. Thank you.

(Documents tendered.)

• • • • •

Q. (By Mr. Lazar.) Now, Mr. Bellush, I now show you General Counsel's Exhibit No. 3 for identification and ask you if you recognize that exhibit which purports to be the contract between your company and the union which was executed on April 23, 1963?

A. Yes, this is it.

Q. Does it bear your signature, sir?

A. Yes, it does.

Q. Does it bear the signature of other members, officers of your company?

A. Yes, sir.

Q. Does it also bear the signature of officers of the union?

12 A. Yes, it does.

• • • • •

Q. (By Mr. Lazar.) Now, Mr. Bellush, I will show you just above Article 1 here on page 2 of the bargaining agreement. Would you read that, please.

• • • • •

13 The Witness: I have read it.

Q. (By Mr. Lazar.) Now, is that the bargaining unit that you agreed to that would represent the employees, the bargaining unit that the company would recognize?

A. Yes, it is.

Q. As far as you know the union represents the members, all the members of that particular bargaining unit?

A. Yes.

• • • • •

Q. (By Mr. Lazar.) Now, Mr. Bellush, how many people are there employed in the unit that is described

14 on page 2 of the contract?

Trial Examiner: At the present time?

Q. (By Mr. Lazar.) At the present time.

A. About 115.

• • • • •

Mr. Lazar: I am going to ask that General Counsel's Exhibit No. 3 for identification be received in evidence and I will ask leave to substitute these copies, printed copies.

Trial Examiner: There is no objection, is there, Mr. Kovar?

Mr. Kovar: No objections.

Trial Examiner: They will be received.

(Whereupon, GENERAL COUNSEL'S EXHIBIT NO. 3 was received in evidence.)

Trial Examiner: Is this the only plant of the company, the Chicago plant, or do you have other plants, sir?

A. The Witness: No, we have other plants.

Trial Examiner: That is what I thought.

Trial Examiner: Is this the main plant?

The Witness: Yes.

* * * * *

Q. (By Mr. Lazar.) Now, Mr. Bellush, I am going to show you General Counsel's Exhibit No. 4-A for identification and ask you if you recognize that exhibit which purports to be a grievance or complaint filed by the union.

A. Yes, I do recognize it.

Q. Did you receive that on or about the date that is on the face of this document?

A. Yes.

Q. Which would be January 13, 1964?

A. Yes.

Q. This was given to you by Rudolph Rich, is that correct?

A. Well, sometimes they are handed to me directly. I don't honestly remember. He may have given it to his foreman and the foreman gave it to me.

Q. Is that his signature?

A. Yes.

Q. Now, I will now show you General Counsel's Exhibit No. 4-B for identification and ask you if you recognize that grievance or complaint form which appears to have been filed on January 31, 1964?

A. Yes, I do recognize it.

Q. Now, who was the union steward or the union committeeman who filed that grievance?

A. Victor T. Soholowski.

Q. I will now show you General Counsel's Exhibit No. 4-C for identification, also purporting to be a grievance which was filed by a committeeman, union committeeman on January 31, 1964 and ask you if you recognize that exhibit, sir?

A. Yes, I do.

Q. Who was the union committeeman who filed it?

A. Victor T. Soholowski.

Mr. Kovar: What grievance number are you referring to there?

Mr. Lazar: That would be No. 58.

Mr. Kovar: I think it would help if you refer to the number of the grievance.

Mr. Lazar: Yes.

Let the record show that General Counsel's Exhibit No. 4-A for identification appears to be grievance No. 54; General Counsel's Exhibit No. 4-B for identification appears to be grievance 57.

17 General Counsel's Exhibit No. 4-C for identification appears to be grievance No. 58.

Q. (By Mr. Lazar.) I now show you General Counsel's Exhibit No. 4 for identification purporting to be grievance No. 60, a grievance filed by the union committeeman on February 10, 1964 and ask you if you recognize that?

A. Yes, sir, I do.

Q. What committeeman presented that grievance?

A. Rudolph Rich.

Q. I now show you General Counsel's Exhibit No. 4-E for identification purporting to be grievance No. 61 dated February 10, 1964 and ask you if you recognize that grievance?

A. Yes, I do.

Q. Who filed that grievance for the union?

A. Rudolph Rich.

Q. I now show you General Counsel's Exhibit No. 4-F for identification purporting to be grievance No. 62 dated February 10, 1964 and ask you if you recognize that exhibit, sir?

A. Yes, sir, I do.

Q. Who presented that for the union?

A. Rudolph Rich.

Q. I now show you General Counsel's Exhibit No. 4-G for identification purporting to be grievance No. 63 dated March 2, 1964 and ask you if you recognize that grievance, sir?

A. Yes, sir, I do.

Q. Who was the union committeeman who presented that on behalf of the union?

A. Rudolph Rich.

Q. I now show you General Counsel's Exhibit No. 4-H for identification purporting to be a grievance or complaint No. 64 dated March 3, 1964 and ask you if you recognize that?

A. Yes.

Q. Who was the union steward or committeeman who presented that to the company?

A. Victor T. Soholowski.

Q. I show you General Counsel's Exhibit No. 4-I for identification purporting to be grievance No. 65 dated March 3, 1964 and ask you if you recognize that grievance, sir?

A. Yes, I do.

Q. Who filed that?

A. Victor T. Soholowski.

Q. I will now show you General Counsel's Exhibit No. 4-J for identification purporting to be grievance No. 66 dated March 3, 1964 and ask you if you recognize?

A. Recognize that—yes, sir I do.

Q. Who was the union steward or committeeman who presented that to the company?

A. Victor T. Soholowski.

Q. I now show you General Counsel's Exhibit No. 4-K purporting to be grievance No. 67 dated March 3, 1964 and ask if you recognize that?

A. Yes, sir, I do.

Q. Which union steward filed that one?

A. Victor T. Soholowski.

Q. Now, Mr. Bellish, these grievances which you have just identified, are they still pending?

A. Yes, sir.

Mr. Lazar: I will ask that General Counsel's Exhibit Nos. 4-A through 4-K for identification be received in evidence as General Counsel's Exhibit Nos. 4-A through 4-K.

Trial Examiner: Any objections?

Mr. Kovar: No objections.

Trial Examiner: They will be received.

(Whereupon, GENERAL COUNSEL'S EXHIBIT NOS. 4-A through 4-K were received into evidence.)

* * * * *

Do all of these grievances relate to about the same set of facts?

Mr. Lazar: No.

Trial Examiner: Do they relate to these—to employees who have been laid off?

Mr. Lazar: Mr. Funke, it is the position of the General Counsel that this isn't all that is material here. They relate to the movement of machinery for the most part.

Trial Examiner: All right. I think you have answered my question.

But I do understand that all of these grievances are presently pending in the grievance procedures stage set up under the contract?

• • • • •

21 *Cross-Examination.*

Q. (By Mr. Kovar.) Mr. Bellush, with respect to General Counsel's Exhibit No. 4-A which is grievance No. 54, this grievance has to do with the alleged removal of a Kleerman Machine?

A. Yes.

Q. Employees in what department utilized that
22 machine prior to April of 1963?

A. Tool room employees.

Mr. Lazar: Objection, Mr. Trial Examiner, I don't know what materiality it has at this point.

Trial Examiner: I don't either but it is a preliminary question. I will permit it.

Q. (By Mr. Kovar.) Subsequent to April 23, 1964, the execution date of the current collective bargaining agreement, how many tool room employees did the company have actively employed?

A. Two.

Q. Between April 23, 1963—I may have referred to 1964 in the earlier question—April 23, 1963 is the execution date of the current contract.

Between that date and the date of filing of this grievance, was there any change in the number of tool room employes actively employed by the company?

A. No.

Q. Subsequent to the removal of the Kleerman Machine, was there any reduction in the number of tool room employees actively employed by the company?

A. No.

Q. Were any tool room employees reduced in classification subsequent to the removal of the Kleerman Machine?

A. No.

23 Trial Examiner: What is the number of that grievance, sir?

Mr. Kovar: That is grievance No. 54 which has been identified as General Counsel's Exhibit No. 4-A.

Q. (By Mr. Kovar.) Directing your attention to General Counsel's Exhibit No. 4-B which is grievance No. 57 which deals with the alleged removal of Jeweler's Lathes, on April 23, 1963, how many Jeweler's Lathes were there in the plant?

A. Two.

Q. On the date that the grievance No. 57 was filed, how many Jeweler's Lathes were there in the plant?

A. Two.

Mr. Friedman: I object on the grounds that it is not material to the issue of the hearing, Mr. Trial Examiner. The issue in the case is whether or not the employer was obligated to furnish information to the union in connection with the processing of the grievances. The issue of the case is not the merit of the grievances. We are not asking the Board to decide the merits of the grievance.

Trial Examiner: One of the issues in this case is whether or not the parties should have resorted to the terms of the contract instead of coming to the Board with an unfair labor practice. So, I am going to accept this

24 information on that basis, this testimony. I know the scope that you are giving to the construction of the charge in the complaint. I understand that. But I think the counsel for the Respondent is entitled to put in the facts since he believes that the scope—he believes that the Board should not exercise jurisdiction hereto.

Mr. Friedman: Mr. Trial Examiner, isn't that a ques-

tion that the Examiner should rule on at this point as to whether or not that is a—

Trial Examiner: I am going to permit him to get in the evidence. That is my ruling, because I think there is a very serious question as to should this be before the Board.

• • • • •

To exclude this testimony and confine the taking of testimony as to whether or not the Respondent furnished the information—I think we agreed that the Respondent did not furnish the information?

Mr. Friedman: Yes.

• • • • •

25 Q. How many Jeweler's Lathes were there in the plant on or about April 8, 1964, the date that you received a letter referred to in the complaint?

A. Two.

Q. Prior to April 23, 1963, did the company have any employees classified as Jeweler's Lathe?

A. Yes.

Q. Subsequent to April 23, 1963, did the company have any employees actively classified in the Jeweler's Lathe Classification?

A. No.

Q. At any time?

A. No.

Q. Directing your attention to General Counsel's Exhibit No. 4-C which is grievance No. 58—

• • • • •

27 Mr. Lazar: What I am trying to find out, Mr. Trial Examiner, are you trying to interpret this contract and tell us what exactly that particular paragraph means?

Trial Examiner: No, I am trying to find out whether or not you should have resorted to the grievance proceedings rather than come before the Labor Board.

Mr. Lazar: I don't think there is any question about this.

Trial Examiner: Well, I do.

I will refer you, now—I will read in fact from the Cloverleaf decision where they found, of course, it was an unfair labor practice. It says: "Nor is this a case involving an alleged unfair labor practice, the existence of which
28 turns primarily on an interpretation of specific contractural provisions unquestionably encompassed by the contract arbitration provision. And coming to us in a context that makes it reasonably probable that arbitration settlement, the contract dispute would also put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act.

Mr. Lazar: Would you give me the citations.

Trial Examiner: Here, I will let you have it.

Now, that is the majority explaining what— the three members agreed that there was an unfair labor practice because the subcontracting was not covered by the contract. Now, I might construe this contract to mean that if there were no employee affected by a layoff, no employee put in a reduced status, then the contract was not invoked, the contract clause was not invoked and that the information would not be required under the contract, not under Board law. That is why I want to get this information.

* * * * *

29 My question is this: Was the equipment involved in grievance No. 58 used by the company at the Laflin Street address subsequent to April 23, 1963?

A. Not to my knowledge.

Q. Did you investigate this matter when the grievance was filed?

A. Yes, I did.

Q. Pursuant to your investigation, what did you find?

30 A. Is that the big Natco Multiple Drill?

Q. Yes, the grievance refers to a multiple drill press, sir.

A. All right. No, that equipment wasn't used after April 23, 1963.

Q. With regard to General Counsel's Exhibit No. 4-D which is Grievance No. 60, the grievance alleges the removal of thread grinding machines. Subsequent to April 23, 1963, did the company have any employees actively classified as thread grinders?

A. No.

* * * * *

Trial Examiner: Did you have any employees working on these machines—what is the date—

Mr. Kovar: I have been using the date of the execution of this contract, April 23, 1963.

Trial Examiner: Did you have any employees working on the thread grinding machines, do you know?

The Witness: Occasionally they were used by external grinders for slotting and grooving.

Trial Examiner: Do you mean grinders from outside the shop?

The Witness: No.

Trial Examiner: External grinders?

31 The Witness: Yes.

Trial Examiner: Not from outside the shop?

The Witness: That is right.

Q. (By Mr. Kovar.) In response to the question of the Trial Examiner, did you indicate that this equipment was used subsequently to April 23, 1963?

A. Yes.

Q. By employees in what classification?

A. External grinder.

Q. Subsequent to April 23, 1963, has any employees classified as external grinders been laid off?

A. No.

Q. Have any employees in such classification been reduced in that classification since that date?

A. No.

Q. Did you indicate in response to the Trial Examiner's question what kind of work was done on this equipment subsequent to April 23, 1963?

A. Yes, slotting and grooving work.

Q. Was that kind of work still done in the Laflin Street address?

A. Occasionally.

* * * * *

32 Mr. Kovar: I have been interrupted constantly in an attempt to question this witness, this witness who incidentally was subpoenaed by the General Counsel, this witness who was called to the stand by the General Counsel, this witness who is at the present time the General Counsel's witness.

On cross-examination it seems to me that I am allowed great latitude to this type of questioning. I have been asking or attempting to ask questions to this time concerning grievances which the General Counsel introduced in evidence. Why I must be subjected to this constant harassment is completely beyond me, sir.

Trial Examiner: I am giving the General Counsel a standing objection. I have made my ruling on the proper examination. I have granted you the scope to cross-examine particularly on these grievance papers which were introduced by the General Counsel. However, the General
33 Counsel has made no contention that any employees were laid off or were put in a reduced status as the result of the moving of any equipment. I think we are trying something that is not an issue in the case.

Mr. Lazar: Exactly.

Trial Examiner: This is my objection to it.

Mr. Kovar: It seems to me that the objection goes to the very heart of this matter. We don't believe that there is any issue here, any proper issue here before us and therefore we can only look to the collective bargaining agreement between the parties to see what they are bargaining about concerning the subject matter which is apparently involved in this unfair labor practice.

Now, looking to the grievances which the General Counsel has introduced in evidence, concerning removing of equipment, we have bargained concerning that matter and have a provision in the agreement concerning that matter. Therefore, I am attempting to ask this witness to testify concerning this or these grievances and what are some of the factual background material to them as they apply to this contract.

Trial Examiner: I certainly believe that you are putting in an affirmative defense before there has been any charge made by the General Counsel that there were either layoffs or reductions in force.

* * * * *

34 Q. (By Mr. Kovar.) With respect to General Counsel's Exhibit No. 4-E which is grievance No. 61 alleging the removal of two O. D. Grinders. What classification of employees are assigned to work on O. D. Grinders?

35 A. External grinders or as we sometimes call them, O. D. Grinders.

Q. Does the company have more employees in such classification at the present time than they did on prior to the alleged removal of this equipment?

A. Yes, we do.

Trial Examiner: How many did you have prior to the removal, may I ask?

The Witness: Seven or eight—six, maybe.

Trial Examiner: How many since the removal?

The Witness: We have two more.

Trial Examiner: All right.

Q. (By Mr. Kovar.) Any employees in such classification laid off since the removal of this equipment?

A. No.

Q. Any employees in such classification reduced from that classification since the removal of this equipment?

A. No.

* * * * *

36 Q. (By Mr. Kovar.) With respect to General Counsel's Exhibit No. 4-G which is grievance No. 63 which alleges the removal of one Hauser Jig Borer, in what department was this equipment used?

A. Tool room.

Q. Since April 23, 1963, has there been any reduction in the number of employees, tool room employees employed by the company?

A. No.

Trial Examiner: That is the place where they had two and still have two?

The Witness: Yes, sir.

Q. (By Mr. Kovar.) Directing your attention to
37 General Counsel's Exhibit No. 4-H which was grievance No. 64 and alleging the removal of one Chucker from the plant, sir, do you recall when this equipment was last used by the company?

A. During my investigation I was informed that it was used about 8 or 10 years ago. That is prior to my time, sir.

Q. Were any employees laid off as a result of its removal?

A. No.

Q. Any employee reduced in classification as a result of its removal?

A. No.

Q. With respect to grievance No. 65 which has been identified as General Counsel's Exhibit No. 4-I and alleges

the removal of a Straddle Mill Machine, when was this equipment last used by the company?

A. Oh, several years ago. That is used primarily for pipes. We no longer have a substantial volume of pipe work.

Q. Any employee laid off as a result of the removal?

A. No.

Q. Any employee reduced in classification as a result thereof?

A. No.

38 Q. With respect to General Counsel's Exhibit No. 4-J, Grievance No. 66, it alleges the removal of four Single Spindle drill press machines.

Trial Examiner: No. 66?

Mr. Kovar: Yes, sir.

Q. (By Mr. Kovar.) Has this equipment been used by the company at its Laflin address since the strike?

A. No.

Q. Was there a strike which terminated on or about April 23, 1963?

A. Yes, there was.

Q. Has this equipment been used since April 23, 1963?

A. No.

Q. Have any employees been laid off as a result of the removal?

A. No.

Q. Any employee been reduced in classification as a result thereof?

A. No.

Trial Examiner: How long did this strike last?

The Witness: Eight months.

Trial Examiner: Ending April 23?

The Witness: Yes.

Trial Examiner: These machines were removed in the interim period?

39 Mr. Lazar: No, no, subsequent.

Trial Examiner: Oh, subsequent?

Mr. Lazar: Yes.

Trial Examiner: That is '63, isn't it?

Mr. Kovar: That is right, sir.

Q. (By Mr. Kovar.) Directing your attention to General Counsel's Exhibit No. 4-K which is grievance No. 67 and which alleges the removal of four Traubs Automatic Screw Machines, was this equipment used by the company at its Laflin address since April 23, 1963?

A. No.

Q. Any employee laid off as a result of its removal, sir?

A. No.

Q. Any employee reduced in classification as a result thereof?

A. No.

* * * * *

Redirect Examination.

* * * * *

40 Q. (By Mr. Lazar.) In any of the classifications of any of the employees who were working on any of the machines which were described in any of the grievances that you have just been questioned about, are any of these employees now making less money than they made prior to the strike, sir?

* * * * *

The Witness: I don't believe I can honestly answer that.

Q. (By Mr. Lazar.) You don't know?

A. I don't really know.

Q. You don't really know,

A. That is right.

Q. Now, Mr. Bellush, have you sub contracted out any work since April 23, 1963?

Mr. Kovar: I object to the question.

Trial Examiner: I will sustain. I don't see the relevance of that question.

41 Mr. Lazar: Mr. Trial Examiner, that—this may not have been before us but you didn't limit the Respondent to the scope of the cross.

Trial Examiner: I am limiting the Respondent's counsel to the grievance documents which were introduced by you.

Mr. Lazar: The grievance documents speak for themselves and they include that provision in the contract.

Trial Examiner: I am not going to get into sub-contracting issues. It is in the alleged—it is alleged in the complaint.

Mr. Lazar: On the contrary.

Trial Examiner: It goes beyond the scope of the complaint.

Mr. Lazar: The complaint is quite broad. It doesn't mention any specific paragraph of the contract.

Trial Examiner: You requested information. I am not going to let sub-contracting get into this case.

Mr. Lazar: How did this matter get into the case, the matter of these particular—

Trial Examiner: Because the contract itself provides in the section—"Employees working in such plant or such department who are subject to a reduction in classification or layoff as a result thereof may transfer to the new

42 location will full rights and seniority.

• • • • •

Before you start, I just want to point out that paragraph 8 of the General Counsel's complaint alleges that Respondent has refused and continues to refuse to furnish to the union information relating to the removal of equipment and machines in Respondent's plant.

It refers solely to information and to the removal of equipment. It does not refer to sub contracting. I can-

not by any stretch of my imagination state that the sub
43 contracting issue can arise under that paragraph of your complaint.

You may be heard.

Mr. Lazar: All right. Is that your position, sir?

Trial Examiner: Yes.

Mr. Lazar: We will take strenuous objection to that position on the theory that this information was necessary because at no time did the company, as long as the company was failing to tell the union what it did with the machinery and where it was being used, wasn't able to determine whether or not there had been subcontracting. It seems to me that this is clearly an issue. It was made an issue by the grievances.

• • • • •

46 Q. (By Mr. Lazar.) You are the industrial relations manager of the company, are you not?

A. Yes.

Q. You handled most of these grievances, do you or don't you?

A. Yes.

• • • • •

Q. (By Mr. Lazar.) What are your duties, Mr. Bellush, without looking at your counsel as you have been doing?

Mr. Kovar: Objection; move to strike.

Trial Examiner: Sustained. Strike it.

47 Go ahead.

The Witness: I am in charge of the industrial relations and personnel functions, sir.

Q. (By Mr. Lazar.) Now, in personnel functions, how many people are employed in the personnel department itself?

A. Only two of us currently. Normally there are three sir.

Q. What is your function in the personnel department?

A. Well, I am in charge of the recruiting for office and factory, reviewing of employee performance, handling grievances or issues that arise between the company and the union. I assist in the preparation for arbitration cases and for contract negotiations.

• • • • •

48 Q. (By Mr. Lazar.) Mr. Bellush, whenever requests were made by the union of the company for information, who would they be referred to?

A. Normally to myself or to Mr. Gabriel, our president.

Q. And with respect to the handling of those grievances, who would handle those grievances for the company?

A. I would, sir.

• • • • •

49 Q. (By Mr. Lazar.) Mr. Bellush, with respect to these grievances that were filed, those that have been identified here and are now in evidence, General Counsel's Exhibit No. 4-A through 4-K. At the time that these grievances were filed, were you made aware of what the union's position was and why they wanted the information?

A. Sir, they did not ask me for that information at those grievance meetings.

Q. They didn't talk to you personally?

A. They did, sir.

Q. They did talk to you?

A. Yes, sir, they did.

Q. They didn't ask you for the information?

A. No, sir.

Q. Not at all?

A. Only in connection with one grievance. They were joking with me about it and they said, "Well, we know where it went anyway and what it is used for."

50 Q. They said that?

A. Yes.

Q. Who said that?

A. Mr. Antalek and Mr. Rich.

• • • • •

51 Q. (By Mr. Lazar.) I now show you General Counsel's Exhibit No. 5 for identification purporting to be a letter to the Acme Industrial Company addressed to your attention from Mr. William Antalek, President of Local 310 of the UAW. Do you recognize that?

A. Yes, I do.

Q. Did you receive that on or about the date it bears or somewhere close to that?

A. I received it April 8.

Q. April 8?

A. Yes, sir.

Q. And is it in exactly the same condition that it was in at the time you received it?

A. Well, except these notations on this.

Q. Which notations?

A. "G. C. 5 for identification."

Q. Except for that?

A. And I put this on here.

Q. What is that?

A. That is an abbreviation for "received." The date of 4/8/64 is on there, and my initials.

Q. All right.

Mr. Lazar: I will now ask that General Counsel's Exhibit No. 5 for identification be received, Mr. Examiner.

52 Mr. Kovar: No objections.

Mr. Lazar: And I will ask for leave to substitute therefore duplicate copies.

Trial Examiner: Granted. It will be received.

(Whereupon, GENERAL COUNSEL'S EXHIBIT NO. 5 was received into evidence.)

• • • • •

Q. (By Mr. Lazar.) Now, Mr. Bellush, I show you General Counsel's Exhibit No. 6 for identification purporting to be a letter from you on behalf of the company to Mr. William Antalek, President of Local 310, UAW, AFL-CIO, dated April 16, 1964 and ask if you recognize it?

A. Yes, I do.

Q. Was that letter written by you?

A. No, sir.

Q. Does it bear your signature?

A. Yes, sir.

Q. Did you read it before it was signed?

A. Yes, sir.

53 Q. That isn't your signature you say?

A. No, that is my signature I said.

Mr. Lazar: I will ask that General Counsel's Exhibit No. 6 for identification be received in evidence as General Counsel's Exhibit No. 6.

Mr. Kovar: No objections.

Trial Examiner: It will be received.

(Whereupon, GENERAL COUNSEL'S EXHIBIT NO. 6 was received into evidence.)

• • • • •

54 Mr. Lazar: I have no further questions of this witness.

However, I'd like to reaffirm at this time my basic objection to the Trial Examiner's ruling and take exception to the ruling. I realize I have an automatic exception. However, I want it understood that the reason for my exception to the ruling with respect to testimony on sub contracting does basically to the issue as to whether or not this information would have elicited, if granted, would have elicited such information. In other words, if the company had told the union why it was removing the machinery and where it was removing it to, then it would necessarily follow that if the company was sub contracting, the union would have had certain rights under the contract and also

under the law if not expressly by virtue of the contract to demand bargaining over that subject.

Not having knowledge of that fact, the union was in no position to make any demand or to process its grievances.

Trial Examiner: I am making the same statement.

Your complaint very specifically refers to information
55 related to the removal of equipment and machines.

Now, you have had an investigation in this case. Had you found a violation of the sub contracting clause in the investigation of this charge, you could have had—you could have asked the union to amend the charge and brought all of that in.

* * * * *

56 Q. (By Mr. Friedman.) Mr. Bellush, at the present time, approximately how many employees of the company are in a layoff status?

A. About 36.

Q. About how many?

A. Yes.

Q. About 36?

A. Yes.

Q. And is that the approximate number that have been on layoff ever since the strike ended in April of '63?

A. No, sir.

Trial Examiner: It is?

The Witness: No, sir, it is not.

Q. (By Mr. Friedman.) Were there a larger number of employees than that on layoff at any time since April of '63?

57 A. Yes, many more were laid off right after we resumed operations.

Q. Would it be correct to say that the figure of people on layoff since the strike ended has varied between approximately 30 some which is the present figure to about 75 or so at the maximum?

A. It was a little higher than that, really.

Q. Or a little higher than that?

A. Yes.

• • • • •

58 Mr. Kovar: Mr. Friedman, if it would help, I'd be willing to stipulate that all the equipment mentioned in any of these grievances requires an employee to operate them.

Mr. Friedman: All right. I will accept that stipulation to save time.

The Witness: Not continuously.

Q. (By Mr. Friedman.) If all of these machines that are mentioned in the various exhibits were in the plant and were being operated on a relatively full time basis, they would require additional employees, would they not?

• • • • •

The Witness: If they were in the plant, yes, and if we had work to run on them if they were operated on a full time basis, yes, we'd need employees on most of them. Some aren't that way. You can spread employees over that machine as well as others.

• • • • •

59 Q. (By Mr. Lazar.) Mr. Bellush, in addition to the 36 people who are presently on layoff status, are there not some people who you no longer consider on layoff status because their seniority has terminated since the strike, since the termination of the strike?

A. Yes.

Q. About how many people are those?

A. Must be 7 or 8 or 9.

Q. How many people were employed in the unit that is described in the contract prior to the strike?

• • • • •

The Witness: Approximately 188, 190.

Q. (By Mr. Lazar.) How many are employed in the unit at the present time?

• • • • •

A. One hundred and fifteen.

• • • • •

61 Afternoon Session.

Trial Examiner: The hearing will be in order.

RUDOLPH RICH, called by and on behalf of Counsel for General Counsel, National Labor Relations Board, having been first duly sworn was examined and testified as follows:

Trial Examiner: Give your name and address to the Reporter.

The Witness: Rudolph Rich. I live at 6216 Belleplaine Avenue.

Direct Examination.

Q. (By Mr. Lazar.) Would you speak up loudly, Mr. Rich, so that everybody can hear you.

A. Yes.

Q. Now, Mr. Rich, by whom are you employed?

A. I am employed by Acme Industrial Company.

Q. And for how long all tolled have you been employed by that company?

A. All tolled, I believe it amounts to about 22 years.

Q. And how long continually?

A. Fourteen years, approximately 14 years.

Q. Now, do you have any connection with the union, sir?

A. I do.

Q. What union is that?

62 A. UAW, Local 310.

Q. What is your position with that local?

A. I am the vice president of Local 310.

Q. Have you any other capacity with them?

A. Yes, I have.

Q. What was that?

A. Trustee.

Q. Have you had any other capacity?

A. I have been a steward.

Q. And have you been a steward in the last year?

A. Yes, I have.

Q. Now, Mr. Rich, during the time that you were union steward, did you have any occasion to file any grievances, sir?

A. I did have occasion.

Q. I now show you General Counsel's Exhibit No. 4-A in evidence and ask you if you recognize that?

A. I do recognize this grievance.

Q. Now, did you file that grievance?

A. Yes, I did file the grievance.

Q. Now, what date was that grievance filed?

A. Well, it is January 13 of 1964.

Q. What was the numbered designation that you gave that grievance?

A. The number was 54.

63 Q. Now, Mr. Rich, prior to filing that written grievance which you now hold in your hand, did you have any occasion to talk to anyone about the subject matter of that grievance?

A. I did.

Q. To whom did you talk about it?

A. I spoke to foreman Paul Steelhammer.

Q. Now, about when was this that you talked to him?

A. Well, it was within a five day period which our contract states—

Q. What do you mean by a five day period?

A. Previous to this filing of the written filing of the grievance.

Q. Where did this conversation take place with Mr. Steelhammer?

A. It took place on the second floor in Department 33

which is referred to as the O. D. Grinding Department, better known as the external grinding department.

Q. Now, who was present besides yourself and Mr. Steelhammer?

A. There was no one else present.

Q. What, if anything, did you say to him and what, if anything, did he say to you?

A. Well, I asked him if he was willing to give us—meaning the union as a union representative I referred
64 to in the plural—

Q. Speak up louder, please.

A. I asked Mr. Steelhammer if he would give me as a union representative the information that we felt was needed when we were aware of the fact that machinery was being moved out of the plant which without this information forthcoming we were unable to continue—or even originate the filing of a grievance.

Q. Well what else, if anything, did you say to him?

A. Well, I will have to put it this way: That he was unable to give me an answer at this time and told me that he'd return within about five minutes or so with the information I was seeking.

Q. But prior to going away, was anything else said by you to him with respect to this information that you were requesting?

A. Prior to that time I can't remember offhand but the only thing I remember that he was—from the way I gathered he was unable to commit himself until he saw the industrial relations manager.

Q. When he returned what, if anything, did he say to you?

A. Well—

Q. By the way, who was present at the second conversation?

65 A. Same two people: Mr. Steelhammer and myself.

Q. This was five minutes after the first one?

A. Approximately five minutes.

Q. What, if anything, did he say to you?

A. Well, he stated that the company felt that they were not in violation of the contract and therefore they did not feel compelled to give the union any definite answer as to why the machine was moved or where, the whereabouts of it.

Q. Did you then say something else to him?

A. Yes, I did.

Q. What did you say?

A. Well, I asked him if he was aware of the fact that the reason we needed this information was to be able to process this grievance which I could see now was to be forthcoming because he had not given the information we were seeking.

* * * * *

66 Q. (By Mr. Lazar.) Now with respect to General Counsel's Exhibit No. 4-D, did that—N. 4-D that you now have in your hand, did you file that grievance?

A. I did.

Q. What was the date that you filed it on?

A. The date of filing was the 10th of February 1964.

67 Q. Now, prior to filing that grievance, did you have a conversation with somebody about the subject matter of the grievance?

A. I did.

Q. With whom was that?

A. The foreman, Eddie T of the O. D. department.

Q. Is Eddie T his full name?

A. No, it is not his full name. He has a last name that I imagine is quite hard to be pronounced. The spelling alone is enough to throw you. So the company and the union refer to this employee or this foreman as Eddie T.

Q. Now, where did this conversation take place and when?

A. This conversation took place on the second floor in the O. D. grinding department.

Q. When did you say this conversation took place?

A. Well, I would say within a period of five days preceding the written stage of the grievance. As to the exact number of days I couldn't say but it was approximately within five days previous.

Q. Now, what did you say to Mr. T and what did he say to you with respect to the filing of this grievance or the subject matter of this grievance?

A. Well, I asked Eddie T if he would be able to give me the information as to the movement of this machine.
68 In fact it is in the plural. It is more than one. He gave me the same excuse that the previous foreman and—the previous foreman Steelhammer gave me that he would have to get the information and return to me to see what information he could give me.

Q. What happened?

A. He told me that the company still held the position that they were not violating the contract and therefore they felt they were not compelled to give the union this information.

Trial Examiner: They haven't—they never gave you the information?

The Witness: They never did.

Q. (By Mr. Lazar.) Now, Mr. Rich, did you say anything to him when he told you that?

A. I did.

Q. What did you say?

A. Well, I asked him if he personally didn't feel that we were entitled to it and of course he wasn't at liberty to say what his personal feelings were. He was only relating the company's official stand on this. I asked him if he

didn't think that we were right in contending that there might be people deprived of recall to their original job classifications or if he didn't think that we felt that the
69 people would be downgraded in their classifications.

Q. By the way, Mr. Rich, with respect to these grinding machines, were these machines used after April 23, 1963?

A. Yes, they were.

Q. Can you tell me who used those machines?

A. Well, offhand, I could name about three persons and I believe there were more involved but I think three will suffice.

Q. Name them.

A. There was Milt Grazynski, John Mangin and there was Ed Jackson.

Q. So that these machines were used after the strike terminated?

A. Yes, they were.

Q. Now, what classifications were these people in, job classifications, if you can recall?

A. I can recall Milt Grazynski held the "B" classification of an O. D. grinder and John Mangin held the "A" classification which in his case included the thread grinding classifications. Besides being leadman previous to the strike, it was our understanding that when he returned that he was still in that same classification. In other words, whoever was the leadman in that department, the setup was so arranged that he was also a leadman in the thread grinding and would receive the top rate of that
70 pay.

Q. Now, was that classification ever changed as a result of the removal of the machinery?

A. That classification has been, I believe, went to arbitration since the strike ended.

Q. You mean the grievance over the particular—

A. Over thread grinding which included a phase of thread grinding which had originally be accepted by the company as part and parcel of the thread grinding classification.

Q. Was this prior to the removal of the machinery or subsequent to the removal of the machinery?

A. It was subsequent to the removal of the machinery.

Q. Now, Mr. Rich, I will ask you to look at General Counsel's Exhibit No. 4-F, would you, and I ask you if you recognize that grievance?

A. I recognize it.

Q. What is the number of that grievance?

A. No. 62.

Q. When did you file that grievance?

A. It was filed on the 10th of February, 1964.

Q. Prior to the filing of that grievance, did you have a conversation with anybody regarding the subject matter of the grievance itself?

A. I did.

71 Q. Could you tell me who it was that you had the conversation with?

A. Foreman Eddie T.

Q. What, if anything—where did this conversation take place and who was present?

A. Second floor of the O. D. grinding department.

Q. Was there anybody else present besides yourself and Mr. T?

A. Nobody else was present.

Q. What, if anything did you say to Mr. Eddie T about this?

A. I asked him if the union could be given the information as to the removal of the thread grinding machines out of the plant, the reasons for moving them and the whereabouts that they were to be moved to.

Q. By the way, now, you are apparently—apparently

in the last grievance—the previous grievance you were talking about O. D. grinders, is that correct?

A. No, I believe that is thread grinding.

Q. Thread grinding machines, also?

A. Right.

Q. This was a subsequent grievance?

A. That is correct.

Q. By the way, Mr. Rich, you say that the question of the classification of the thread grinders has been
72 arbitrated, sir?

A. That is correct.

Q. Has the question of the removal of the machinery itself ever been arbitrated?

A. It never has been arbitrated.

Trial Examiner: What is the current status or stage of these grievances?

The Witness: They are pending.

Trial Examiner: They will ultimately go to arbitration, is that correct?

The Witness: I wouldn't say that they will or they won't.

Trial Examiner: If you don't know—

Mr. Lazar: Well, the answer, Mr. Trial Examiner, is obviously without the information. I don't see how in the world they can process these grievances.

Mr. Kovar: When counsel wishes to testify I assume he will be sworn.

Trial Examiner: Well—

Mr. Lazar: I don't see how you can arbitrate a question that you can't get the answer to beforehand, sir. The question that arises here is whether or not they are entitled to the information or not.

Trial Examiner: There are two questions here: One is whether or not they are entitled to the information
73 and two, whether or not the problem before us should

be before the Board or in arbitration. Those are the two questions.

Mr. Lazar: Well, I don't see that that is—

Trial Examiner: Well, let's not argue the point while examining the witness.

Mr. Lazar: How can they arbitrate from information they don't have?

Q. (By Mr. Lazar.) Mr. Rich, who was it that you had a conversation with?

• • • • •

The Witness: I had this conversation with Foreman Eddie T.

Q. (By Mr. Lazar.) Where did this conversation take place?

A. Second floor in the O.D. grinding department.

Q. What, if anything, did you say to him and what, if anything, did he say to you?

A. I asked him for information which the union was seeking, the reason of the removal of these thread
74 grinding machines and besides asking the reason I asked where they might be going.

Q. When did this conversation take place?

A. Oh, it had to be within the five day period preceding this written stage of the grievance. As to the exact number of days, I couldn't state.

Q. All right. Now what, if anything did you say to him besides that and what did he say to you?

A. Well, I made it known that we felt suspicious that the company was removing these machines for purposes of subcontracting and therefore we felt that were—we felt that they were in violation of the contract which were a party to.

Q. What did he say?

A. Well, Eddie T.—I will have to give a little background on this—he doesn't say much.

Trial Examiner: Just say what he said.

The Witness: Right. He said as much as he was told to repeat to me by the personnel director that since they felt they did not violate the contract they were not compelled to give that information to the union.

Q. (By Mr. Lazar.) Now, Mr. Rich I will now show you General Counsel's Exhibit No. 4-G and ask if you recognize that document, sir, purporting to be—

75 Trial Examiner: What number is this?

The Witness: This is No. 63.

Mr. Lazar: All right.

Q. (By Mr. Lazar.) Now, Mr. Rich, when did you file that grievance?

A. I filed this grievance on the second—March 2, 1964.

Q. With whom did you file it—strike that question.

Did you have any conversation with anybody about the subject matter of that grievance?

A. I did.

Q. Prior to the filing of the written grievance?

A. I did.

Q. With whom?

A. Foreman Paul Steelhammer.

Q. When did this conversation take place?

A. It took place within a period of five days previous to the writing of this grievance.

Q. Who was present?

A. Foreman Steelhammer and myself.

Q. Where did the conversation take place?

A. Second floor of the O.D grinding department.

Q. What, if anything did you say to him and what, if anything, did he say to you?

A. I asked him in—I asked him if he could furnish

76 information to the union as to the reason and the destination of the machines being moved from the premises of Acme Industrial Company.

Q. Did you say anything else to him?

A. Yes. Well, this was in the nature of a question. I asked him if he was aware of the fact that the company was in violation of the contract.

Q. What did he say to you?

A. Well, this was a repetitive answer that he had given me previously that the company was taking the position that the—that they felt they were not violating the contract and therefore did not feel compelled to give the union the information they were seeking.

Q. All right. Did you then say anything else to him, sir?

A. I asked him if he realized that there might be a chance that these machines that were being moved out of the plant would be the cause of people on layoff, never to regain their original jobs.

Q. Did you say anything else to him?

A. Furthermore I asked him did he realize that this could affect the status of employees within the company if this were to continue, sir, to the effect that they may be downgraded in their classification.

I also asked him since the union was contending—
77 or the company was contending that they were not in violation of the contract why couldn't he divulge this information to me and the answer was still the same because they felt they were not in violation of the contract.

* * * * *

78 Q. (By Mr. Lazar.) Mr. Rich, will you tell us whether or not any employees have had a changed job classification or reduced wages since the removal of any of the machinery that has been referred to in any of the grievances that the union has filed and are now in evidence. That is General Counsel's Exhibit Nos. 4-A through 4-K.

A. Yes. I know of several employees that have been reduced in classification.

Q. Well, can you name some of them.

A. Johnny Alexander and Ted Wendell, both tool and diemakers is their classification or tool makers.

* * * * *

Q. Let me put it this way: Were either of these men working on any machine that was in the tool room at the time of the settlement of the strike on April 23, 1963 and who as a result of the reclassification, the removal
79 of the machinery subsequently were no longer working on that machinery?

A. I believe so.

Q. Now, can you tell me for how long after the settlement of the strike and the execution of the contract these men worked on machines and what machines they worked on?

A. Well, we have a big assortment of machines in the tool room.

Q. What machines were they working on immediately after the strike?

A. What machines that, I really could not answer.

Trial Examiner: Do you work in this room with these people?

The Witness: I don't work in this room, that is correct.

Q. (By Mr. Lazar.) Well, in other words, is this tool room one of your areas in which you were handling grievances, sir?

A. It is.

Q. Now, what was the nature of the reclassification of these people?

A. Well, from the way I understand it they were tool makers and they now had the classification of a tool room machinist.

80 Q. Well, when did this reclassification take place?

Trial Examiner: He said he understood that—

Q. (By Mr. Lazar.) How did you understand it, from whom?

A. Well, I have to explain this a little bit.

In this procedure since the strike has ended, the President of the Local, William Antalek who is Chairman of the bargaining committee has more or less been designated by the company to handle recalls and layoffs of people involved since the ending of the strike and he is more aware of those facts than I am. I am only repeating what he has told me.

Q. In other words, you don't know of your own knowledge, is that it?

A. That is right.

* * * * *

Cross-Examination.

Q. (By Mr. Kovar.) Mr. Rich, with respect to grievance No. 54 which has been identified as General Counsel's Exhibit No. 4-A, in response to a question of General Counsel you indicated that the grievance was filed within the five-day period. Could you explain to me what five-day period you were referring to in that answer?

81 A. Could I see the grievance that you are referring to?

Q. Yes.

(Document tendered.)

A. Yes, there is a period in the contract that stipulates that the oral discussion will take place and the written stage of the grievance to follow.

Trial Examiner: That is step 2 if I am reading correctly: "If the matter is not satisfactorily settled, the

steward or area committeeman shall reduce the grievance or complaint to writing within given working days."

The Witness: That is right. That is the one I am referring to.

* * * * *

82 Q. (By Mr. Kovar.) Now, you also indicated in your direct testimony with respect to grievance No. 54 that when you asked the foreman Steelhammer for certain information you indicated that you couldn't even file a grievance without this information, is that correct, isn't that what you testified to earlier?

A. Well, I will give you an answer in just a minute. Please repeat the question.

Mr. Kovar: Mr. Reporter, will you please read the question.

(Record read.)

The Witness: If that is my testimony, that is correct.

Q. (By Mr. Kovar.) How can you explain, then, your filing of the grievance?

83 Mr. Lazar: Objection.

Trial Examiner: Sustained. I don't care how the grievance was filed. It was filed.

Q. (By Mr. Kovar.) With respect to your testimony concerning grievance No. 60, you testified that the grievance was filed within five days. Were you then referring to within five days of your conversation with the foreman?

A. I was.

Q. I'd like to show you a copy of grievance No. 60. After reading the first sentence of that grievance which was signed by you, would you like to correct your testimony, sir?

* * * * *

84 The Witness: I think I can clarify this.

Now, I have only been allowed to read the first sentence—I was told to read the first sentence and then

make an analysis of why the dates differ. I believe if we continue reading, this will indicate that we were refused permission or I was the first committeeman in the Local Union that was refused permission to write this grievance as had been consistently done since the inception of the local back in 1946 and I was prevented from writing this grievance in the usual manner which consisted of writing it on company time.

Mr. Kovar: Mr. Trial Examiner, I am having a hard enough time getting the question between objections here. I would appreciate it if I could at least get an answer to a question I actually asked.

85 Mr. Lazar: I think he answered the question.

Trial Examiner: You asked him if he wanted to change his testimony. I cannot recollect his prior testimony.

The Witness: I would say that this was a change in this respect: That I was denied the privilege of writing this and not only the privilege, it had been an accepted fact that the Local Union was and always had written grievances on company time and the delay was there and when there is a delay, naturally, it cannot conform within the five day period previously allowed.

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90 Mr. Kovar: Mr. Trial Examiner, we are concerned with the veracity or the memory of this witness.

91 Trial Examiner: I am not much concerned with it because I don't think his testimony is going to be the basis of any decision of mine.

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Q. (By Mr. Kovar.) Mr. Rich, did you testify earlier that in your opinion employees of the company had been reduced in classification as a result of the removal of equipment?

A. I did.

Q. Can you identify any employees?

A. I believe I did previously. It is John Alexander and Ted Wendell.

Q. Do you have firsthand information as—

A. No, I don't have firsthand information as to the reduction.

Mr. Lazar: Excuse me, Mr. Trial Examiner, we agreed that this testimony was hearsay?

Trial Examiner: We agreed that testimony in this regard was hearsay.

Mr. Kovar: As of these two?

The Witness: Yes.

92 Q. (By Mr. Kovar.) Do you know of anybody else?

A. Offhand, I don't know of anybody else.

Q. As a union representative, are you aware that the company gives written notice to the union of every employee who is laid off? Are you aware of that?

A. Yes, I am.

Q. Are you aware that the company gives written notice of any employee who is reduced in classification?

A. I am.

Q. With respect to anyone of the grievances introduced in evidence by General Counsel, can you tell me if any employee had been laid off within five days prior to the filing of anyone of these grievances? And you take as much time as you wish to study them if that is required sir.

A. Will you repeat that.

Trial Examiner: I don't think that this is any allegation.

Mr. Lazar: There is no such allegation. I don't think it is material or pertinent.

Trial Examiner: Until the General Counsel alleges that someone was laid off within the five day period or even without it, I will sustain the objection, Mr. Kovar.

Mr. Kovar: I think this testimony goes beyond
93 that, Mr. Trial Examiner. I think this testimony goes to the fact that not only has there been no allegation concerning layoff or reduction of classification, there is first hand information available to the union and therefore to the General Counsel concerning this matter and that the silence with respect to it now is not a matter that they don't know. It is a matter that there hasn't been any, Mr. Examiner.

Trial Examiner: I am not interested in that. They haven't alleged any. That settles it. No. 8(a)(3) has been alleged.

Mr. Kovar: It is not a question of that. I have a difficult time myself trying to figure out the theory upon which this case has been based but if we look at the contract, it seems to me that the information available to the union from which I am trying to get testimony concerning is sufficient for it to administer the contract and police the contract.

Now, unless I can get such testimony in the record—

Trial Examiner: You are not going to get testimony of this type into the record unless the General Counsel introduces testimony which relates to an allegation.

The objection is sustained.

* * * * *

94 TONY AUDIA called by and on behalf of Counsel for General Counsel, National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination.

Q. (By Mr. Lazar.) Mr. Audia, what is your business or occupation?

A. I am an international representative for the United Automobile Workers.

95 Q. Now, Mr. Audia, do you know of the existence of Local 310 of your union?

A. I do.

Q. What kind of an organization is that?

A. It is a labor organization, sir.

Q. That is a conclusion. Just tell me what kind of an organization it is.

A. It is an organization organized for the purpose of representing all of the maintenance and production employees for the purpose of collective bargaining for and on behalf of all of the employees of Acme Industrial Company.

Q. Who does it admit to membership?

A. Well—

Trial Examiner: Isn't that stipulated?

Mr. Lazar: No. It was not admitted. I asked for a stipulation and I did not receive one.

Trial Examiner: It is not denied.

Mr. Lazar: Well, it is.

Trial Examiner: All right.

The Witness: The local union is comprised of all of the maintenance and production employees of the company.

Q. (By Mr. Lazar.) Are these all members of the Local?

96 A. Yes, sir.

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WILLIAM ANTALEK called by and on behalf of Counsel, National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Be seated and give your name and address, home address, please.

The Witness: My name, sir, is William Antalek. I reside at 5200 South Damen, Chicago.

Direct Examination.

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Q. Mr. Antalek, do you have any position with the local union, Local 310, UAW?

97 A. Yes, I do. I am president of the Local Union, sir.

Q. Now, subsequent to the execution of the contract of April 23, 1963, has the company ever notified you of any reclassifications of employees?

A. They have not notified me personally, sir, but they have notified the union through the procedure outlined in the contract.

Q. Well was the union given any notice of the reclassification of any employees?

A. Yes, they were, sir.

Q. Now, I will show you General Counsel's Exhibit No. 5. Do you recognize it?

A. Yes, I do, sir.

Q. Did you send that letter to the company on April 3, 1964?

A. I did.

Q. Now, why did you seek the information that you asked for in that letter?

A. Well, sir, we felt that unless the company was willing to supply the information that we had requested in this letter we would not be able to administrate the various articles and sections of the contract and also properly process grievances which at that time were pending.

98 Mr. Lazar: I have no further questions.

Cross Examination.

Q. (By Mr. Kovar.) Which grievances couldn't you process, Mr. Antalek?

A. The grievances pertaining to the removal of the machinery, grievances pertaining to the farming out of work, grievances pertaining to people on layoff.

Q. Can you identify a little more closely as to what grievance you are talking about?

Trial Examiner: Are these the grievances which have been placed in evidence that you are referring to and filed in the grievance procedure?

The Witness: Yes, sir.

Trial Examiner: All right.

Q. (By Mr. Kovar.) Were there any other grievances or are these the ones you are referring to?

A. Offhand, I don't recollect if these—if there were others. I know that these were at that time pending.

Trial Examiner: These were the only times they were put in issue, either in arbitration proceedings or at least in this proceeding, at least we know that.

Q. (By Mr. Kovar.) Does the union receive written notification of any employees or employee who is laid off?

Mr. Lazar: Objection.

Trial Examiner: Has this been answered already?

99 Mr. Lazar: We have already decided that this is not an issue.

Trial Examiner: I think we have. Thank you. Sustained.

Mr. Kovar: I don't think it has been decided that this is not an issue, Mr. Trial Examiner.

Trial Examiner: I would now rule that it is not an issue.

Mr. Kovar: May I be heard before you rule, Mr. Trial Examiner?

Trial Examiner: Yes, sir.

Mr. Kovar: Under Article 6, Section 10 of the collective bargaining agreement, the parties have negotiated a provision which requires that where equipment is moved to another location of the company an employee who is then working in the plant who is subject to reduction in classification or is subject to layoff as a result thereof has certain rights.

Trial Examiner: Yes, that is right.

Mr. Kovar: If the union knows that there are no such employees as we have attempted to indicate is the fact through the testimony we have sought to introduce here, then it seems to me clear on the face that the additional information as to where equipment is moving is completely irrelevant to this contract, to the administration, to

100 its enforcement.

Now, unless I can get into the record clear testimony the fact that the union knows very well that no employee has been laid off as a result of removal of equipment and knows very well that no employee has been reduced in classification as a result of this, I have an open question at which point the General Counsel may argue, "Well, we don't know whether anyone has been laid off or not, and therefore, it might be, this information might be relevant so why not give it."

So, facing that kind of argument, this is relevant.

Trial Examiner: I will accept that kind of argument to the pleadings in this case. So I still consider this question irrelevant as to what is contained within the issues here which I construe is much more narrow than apparently the parties.

This is a very narrow complaint. In effect you are anticipating allegations which have not been made. In other words, asserting an affirmative defense where there is no attack, where no attack has been placed by the General Counsel. I don't think that is necessary. The General Counsel has not made the direct allegation and submitted evidence in support thereof and there is no necessity for you to rebut it.

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101 Mr. Kovar: Mr. Trial Examiner, at this time I will renew the motion which was entered by stipulation at the opening of the hearing and in oral fashion refer that motion and the reasons thereto set forth: I do not believe that the complaint or the evidence supporting it alleges, much less shows a violation of the National Labor Relations Act.

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104 [Trial Examiner] . . . If I reach a decision and say that the Board should accept jurisdiction, then I will reach and only then the question of the relevancy of the information requested. Therefore, I am reserving decision on your motion, naturally.

Mr. Kovar: Respondent would like to call as its witness, Mr. Thomas J. Bellush.

Trial Examiner: All right.

THOMAS J. BELLUSH called by and on behalf of the Respondent, having been first duly sworn, was examined, and testified as follows:

Trial Examiner: Mr. Bellush, you are a recall witness. You are still under oath.

The Witness: Yes, sir.

Direct Examination.

Q. (By Mr. Kovar.) Mr. Bellush, directing your attention to General Counsel's Exhibit No. 4-D which is grievance No. 60, can you tell me on what date the thread grinding machines there involved were removed from the premises of the company?

A. The thread grinding machines were removed January 25, 1964.

105 Q. Mr. Bellush, did the parties, the union here involved and the company engage in an arbitration proceeding, one case of which involved an issue of threading grinding?

A. Yes, they did.

Mr. Friedman: Objection.

Mr. Lazar: Objection.

Trial Examiner: On what ground?

Mr. Friedman: On the ground that it is irrelevant.

Trial Examiner: Well, it seems to me that we have had a great deal of testimony on this issue and I do rather deem it irrelevant but I did suggest that the award would settle the interrogation of one of the witnesses within the questions.

So, I think within those circumstances I will have to admit it. Whether I am going to give it any weight or not, I doubt. I did make that statement in an effort to bring to a conclusion the testimony on this case which was getting us nowhere.

Mr. Kovar: I did not introduce the subject matter of this arbitration, Mr. Trial Examiner.

Trial Examiner: I realize that.

Q. (By Mr. Kovar.) Mr. Bellush, did you answer my question yet?

Trial Examiner: No, he didn't answer it yet, I don't believe he did.

106 The Witness: Will you read the question?

Trial Examiner: Would you repeat the question, Mr. Kovar, for the witness.

Mr. Kovar: All right. I—

Trial Examiner: The question was: Was the subject in this regard subject to arbitration, the dispute?

Q. (By Mr. Kovar.) Was there an issue concerning the work of the grinders, the thread grinders submitted to arbitration by the parties?

A. Yes, there was.

Mr. Lazar: Objection; on the grounds—

Mr. Kovar: This is the same objection that we have just discussed, Mr. Trial Examiner.

Mr. Lazar: This is the question as to whether the subject of the—as to whether the grinders had been submitted to arbitration whereas the grievance itself refers to the thread grinding machines.

Now, I think this is basic and I think this was a misunderstanding that we had in Mr. Rich's testimony.

Trial Examiner: Let's get the award in. I doubt if I will give it any weight or consideration but I opened the door to it myself and I shall pay the penalty.

The objection is, therefore, overruled.

Q. (By Mr. Kovar.) Now, for the third time, Mr.
107 Bellush, did the parties submit to arbitration an issue involving the work of—on the thread grinding equipment?

A. Yes, we did.

Q. On what day was that arbitration hearing held, Mr. Bellush?

A. January 24, 1964.

Mr. Kovar: May we go off the record, Mr. Examiner, please.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record, please.

Mr. Kovar: Would you identify this document, please, Mr. Bellush.

The Witness: Yes. This is an arbitration award received from—an arbitration award received from Harry Abrahams.

Q. (By Mr. Kovar.) Does this award have anything to do with the case we have been discussing here?

A. Yes.

Q. Does this arbitration award cover the grievances involving work on the thread grinding machines which was referred to by Mr. Rich in his direct testimony?

A. Yes, it does.

Mr. Friedman: Just a minute; objection. Are you asking the witness whether this arbitration refers to any 108 of the grievances which are in evidence?

Mr. Kovar: No, sir.

Trial Examiner: No.

Mr. Kovar: I would like to enter into evidence as Respondent's Exhibit No. 1 a photostatic copy of the arbitration award referred to by Mr. Bellush.

Mr. Friedman: Objection to its being received into evidence, Mr. Examiner, Respondent's Exhibit No. 1, on the ground that the exhibit is not relevant to any of the issues in this proceeding and it being apparent from the face of the document itself that it does not relate to any of the grievances which were presented in the record of this case.

Mr. Lazar: General Counsel will join in this objection.

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110 Trial Examiner: The document is admitted.

Q. (By Mr. Kovar.) Mr. Bellush, did you participate in the collective bargaining negotiations between this union and this company for the current contract?

A. Yes, I did.

Q. Can you identify this document, please?

A. Yes. This is the 1959 contract that expired prior to the negotiations.

Q. Did the 1959 contract between the parties have a provision concerning transfer of equipment?

A. Yes, it did.

Q. Would you identify that section that you are referring to.

* * * * *

111 Mr. Kovar: I'd like to have it marked for identification as Respondent's Exhibit No. 2, please.

(Whereupon, Respondent's Exhibit No. 2 was marked for identification.)

Q. (By Mr. Kovar.) Could you identify the section of the contract which relates to transfer of equipment?

A. Page 13, Article 6, Section 7, there is a clause here that relates to transfer of equipment.

Q. During the negotiations for the current collective bargaining agreement, was that section of the old contract discussed between parties?

A. Yes, it was frequently.

Q. Did the union make any proposal for the change of that section of the contract?

A. Yes.

Mr. Friedman: Objection; on the ground of irrelevance, Mr. Examiner.

Trial Examiner: Well, I don't know what counsel has in mind. The only reason that I can see is that if the union has made certain proposals during negotiations, those proposals may have some bearing on the fact though

whether or not the union waived the right to claim for and it received under the contract. There must be a clear and unmistakable waiver, of course, before the union
112 is foreclosed from raising issues which is not explicitly covered by the contract.

Mr. Lazar: Mr. Trial Examiner, Section 7 refers to layoff as a result of the removal of machinery and the same paragraph in the new paragraph it is, which we have already found to be irrelevant. We have already excluded this from the issue. This is the same paragraph that he has been talking about right along. This is not the only paragraph and this is not the only section upon which these people base this need for information.

Now, this is a conclusion that we—that they have come to but it is very obvious from the grievances themselves that this was not the paragraph that was wholly relied upon.

What is the purpose of showing this section? Is it to show that there was change and therefore there had to be bargaining on this issue?

Mr. Kovar: Yes, sir, and it shows the extent and the nature of the bargaining which took place.

Trial Examiner: Are we going through the negotiations which led to this contract or are you going to rely on the change?

Mr. Kovar: I am going to attempt to introduce testimony concerning the negotiations themselves concern-
113 ing the subject matter that was discussed and the scope of the negotiations concerning this matter.

Mr. Friedman: Mr. Trial Examiner, before we get into that area which may be a lengthy area, I'd like to make this suggestion: I think that your observation, in your observation you put your finger on the heart of the issue when you talked about the possibility of waiver in the course of negotiations.

Now, I would withdraw my objection to this questioning

with the thought in mind that if this questioning were directed to whether or not there was any negotiations with respect to the union's right to receive information. If there was a waiver of the union's right to receive information in the course of negotiations, that might be relevant. But all of the other topics that go into the collective bargaining contract are not in issue.

Trial Examiner: I am not going to reopen the negotiations that lead to either of those contracts or particularly to the second one because if I can say, if you can establish that the union waived its right to information during these negotiations, that would be one thing. But to say that the union had waived any other rights in this contract, you have opened the door to an entirely new issue.

Mr. Kovar: Mr. Trial Examiner I will submit that counsel for the Charging Party has forgotten that the 114 letter of request that we are here involved were requesting information, the unfair labor practice charge that we are here involved with and the complaint that was issued in this case all relate to information for the administration and application of the collective bargaining agreement, not a general request for information to help the agent in its bargaining status in the future. It is related strictly and solely to the administration and execution of its rights under that collective bargaining agreement.

Now, how we can divorce from that narrow issue the background to this or of this collective bargaining agreement, seems to me to ignore the very claim here. I quite agree that if we are putting the Board in contract interpretation at this point, I think this is a fault with this case. But this is argument and you will be assured that I will make this argument later on.

Trial Examiner: My point is that I don't think that the union could ever waive the right to any information necessary to administer any clause of a collective bargaining.

That waiver is clearly put in writing. This is a fundamental statutory right. Supreme Courts have upheld it time and time again. I don't think that they could waive that right.

Mr. Kovar: There has been no attempt to argue that.

115 Trial Examiner: I don't see the relevancy.

Mr. Kovar: The relevancy is that the information requested has been related solely to the administration of this contract unless, therefore, the information requested is relevant to this contract it seems to me to that extent the negotiations can waive additional information.

Trial Examiner: The only disagreement has been, I believe, that this relates to Article 6, Section 10. They claim it also relates to the sub contracting clause, Mr. Kovar.

Mr. Kovar: I can't get to other sections of the contract until I get through one and I apparently can't even get through one over the objections here.

Trial Examiner: I am going to sustain the objection.

Mr. Kovar: I'd like to make an offer of proof Mr. Examiner.

Trial Examiner: Yes, do that.

Mr. Kovar: I would like to state that if questioned concerning the negotiations reaching the current collective bargaining agreement between the parties, that this witness would testify that the union requested change in the language of the old contract which I would submit in evidence which has been identified, I believe as Respondent's Exhibit No. 2.

Trial Examiner: Be sure to offer it.

116 Mr. Kovar: That the witness would testify that the union proposed changes to that language. That the union proposed that the company pay for transportation expenses and moving expenses of employees who were affected by the transfers set forth in Section 7.

That during the negotiations for this collective bargaining agreement, the company notified the union. It notified the union that it proposed to transfer equipment to other locations and to third parties and that it was willing to negotiate with the union concerning the permanency of such transfers as well as the effect upon employees should such transfer become permanent.

That as a result of the negotiations, the union initially after such notification was given, initially took the position that all work which had been farmed out, all equipment which had been transferred out must be brought back to the plant at the Laflin Street address within 90 days of execution of the new contract.

That such union demand was denied and that the Section 6—Section 10 of Article 6 was the resulting agreed upon provision of the contract relating to this issue.

* * * * *

117 Secondly, that this witness would testify that during the negotiations for this collective bargaining agreement the parties specifically discussed the issues of subcontracting. That prior to the execution of this contract that there was no provision in the collective bargaining agreement concerning sub contracting and that as a result of the negotiations the parties finally agreed upon Section 3 of Article 1 of the current collective bargaining agreement.

So ends the offer of proof.

Mr. Lazar: And the General Counsel—

Trial Examiner: I don't think I need to hear from the General Counsel at this point. I am going to reject the offer of proof.

118 In the first place, the contract of cause is binding upon the parties. Now the question of its contruction and application is provided for in the grievance procedure. They go to arbitration. The only question before me is

whether the union is entitled to other—is entitled to information under these. Granted, they waived all of these other claims or did not waive them, that is not an issue before me. There has only been a question of information which would enable them to intelligently administer the contract.

I am a little disturbed in the fact that—not in this case but in so many other cases—where a collective bargaining agreement has been reached by the parties and thereafter they come running to the Board because they are disappointed in the agreement that they have signed.

I tend to think this breaks down the entire machinery of collective bargaining.

I am going to reject your offer of proof. In every case we can't go through all negotiations which led to a contract. I think it is partly the Board's own fault that they haven't discouraged this. I say, "You have made your contract," why don't you go where you belong with it. And I also under the Board's point being sustained by the Supreme Court that we have exclusive jurisdiction to cure unfair labor practices. You have to have a balance somewhere there between stabilization of contract and therefore the stabilization of the collective bargaining process and the curing or remedying of unfair labor practices.

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I reject that offer of proof. I have tried to confine this case much more closely than I have been able to. It not only breaks down the collective bargaining machinery, I don't see how it helps the peaceful settlement of dispute which the Act is supposed to encourage for the Board to intervene where a contract has been made.

That is all I have to say on this.

Q. (By Mr. Kovar.) Mr. Bellush, have any employees been laid off since April 23 as a result of any removal of equipment?

A. No.

Mr. Lazar: Objection Mr. Trial Examiner, we have already been through this and you have found this to be irrelevant.

Trial Examiner: Yes, we have in the absence of a claim that any employees were laid off. I have agreed.

Mr. Kovar: I make another offer of proof concerning what Mr. Bellush would testify to:

That he would testify that in fact that there had been no layoff since the execution of this contract, April 23, 1963 as a result of any removal of equipment.

Trial Examiner: The offer is rejected. I think that is inherent in the record that there has been no claim of the layoff, implicit.

Q. (By Mr. Kovar.) Mr. Bellush, have there been any employees reduced in classification since April 23, 1963 as a result of any removal of equipment?

A. No.

Q. Mr. Bellush, has the company refused to take any of the grievances here submitted to arbitration?

A. No.

Mr. Friedman: Objection.

Trial Examiner: Overruled.

Mr. Kovar: No further questions.

Cross-Examination.

Q. (By Mr. Lazar.) Has anybody been reclassified in their employment between the date of the execution of the contract and April 23, 1963 that is, and the removal of the contract—not because of the removal of the contract—removal of the machinery, but prior to the removal of the machinery?

A. Yes.

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121 Mr. Kovar: Excuse me, Mr. Trial Examiner, I think I should have made the offer of the 1959 contract, sir.

Trial Examiner: All right.

Mr. Kovar: I'd like to offer in evidence the document which has been identified as Respondent's Exhibit No. 2.

Mr. Lazar: I will, of course, object to its introduction on the same ground before. It is irrelevant, Mr. Examiner.

Trial Examiner: I will admit it.

(Whereupon, RESPONDENT'S EXHIBIT NO. 2 was received into evidence.)

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GENERAL COUNSEL'S EXHIBIT NO. 3.

* * * * *

Collective Bargaining Agreement.

This Agreement is entered into this 23rd day of April, 1963, between Acme Industrial Company, 200-222 North Laflin Street, Chicago, Illinois, or its successor (hereinafter called the "Company"), and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and its Amalgamated Local Union No. 310 (hereinafter called the "Union"), and is limited in scope to the location noted unless otherwise specifically provided herein.

Witnesseth:

* * * * *

Bargaining Unit.

The unit recognized by the Company and the Union for the purposes of this Contract includes all production and maintenance employees, and all other employees whose job classifications appear in Exhibits "A" and "B" of the Contract, but excluding draftsmen, engineers, full time watchmen, nurse, inventory control clerks, timekeepers, scheduling clerks, and other office clerical employees and all supervisory employees having authority to hire, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

Article I.

Union-Management Relations.

Section 1. The Company recognizes the Union as the sole and exclusive bargaining agency of the employees of the plant (identified in the preamble to this agreement) included in the bargaining unit during the life of this Agreement on all matters pertaining to wages, hours, and conditions of employment.

Section 2. Management's right to manage the operation and to direct the working force is subject to the terms and conditions set forth in this Agreement and any supplementary agreement executed by the parties.

Section 3. It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company. The Company will continue to purchase components and subassemblies and to have other outside work done, including the making of tools and dies, where it is not economic to perform this work in the plant, or where production schedules, equipment, employee skills or other factors make it impractical to perform the work in the plant. Violation of the above will be subject to the grievance procedure.

It is understood that this Section shall have no application to subcontracts in existence at the time of the execution of this Agreement.

Section 4. The parties, believing that a stable and responsible Union is necessary (1) to secure increased production and highest quality of workmanship, and (2) to promote and maintain harmonious relations between employer and employees, do now agree as follows:

(a) Employees covered by this Agreement at the time

it becomes effective and who are members of the Union at that time shall be required as a condition of continued employment to continue membership in the Union for the duration of this Agreement. Employees covered by this Agreement who are not members of the Union at the time this Agreement becomes effective shall be required as a condition of continued employment to become members of the Union within thirty-one (31) days following such effective date.

(b) The Union will accept into membership all employees covered by this Agreement who shall tender Initiation Fees (if not already a member) and the periodic dues uniformly required as a condition of acquiring or retaining membership in the Union.

* * * * *

Article III.

Shop Representation.

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Section 4. Committeemen and stewards shall be permitted such time off away from their jobs as is reasonably necessary to perform their duties as set forth in Article IV, it being understood that only the Shop Chairman and other committeemen, or their alternates in their absence, shall be permitted to visit departments within the area of their representation for the handling of grievances, as provided in Articles III and IV, after receiving a pass from their foreman. When committeemen leave their work station to attend meetings specified in Article IV, they shall also obtain such a pass. Committeemen and stewards shall request permission of their foreman and obtain the aforementioned pass before leaving their place of work to handle a grievance, which permission shall not be unreasonably delayed, it being understood that no such requests may be

made during the first fifteen (15) minutes of the shift or the first fifteen (15) minutes after the lunch period. It is further understood that the time spent in such activity shall not be unreasonable.

Section 5. Stewards or members of the Shop Committee will be paid their regular rate of pay for necessary time lost during working hours within the current workweek in attending Company-Union conferences and handling of grievances as outlined in the Grievance Procedure of this Agreement. Such time lost by stewards or members of the Shop Committee during the workweek shall be considered in computing overtime pay.

Section 6. Whenever the Company requests a Union representative to leave his job and confer on matters other than grievances, such representative shall be paid his regular hourly rate for the time so spent. In the case of the night shift representative, an equal time from his shift will be deducted in lieu of such time spent in Company-Union meetings, negotiation, or arbitration. Where it is practical to do so, in the opinion of the Management, the night shift representative will be allowed to start work on the day shift to finish out the balance of his normal work shift time after a Shop Committee meeting.

Article IV.

Grievance and Complaint Procedure and Arbitration.

Section 1. A grievance is a difference of opinion with respect to the meaning and application of the terms of this Agreement.

Section 2. Grievances or complaints shall be adjusted as follows:

Step 1: Any attempt to adjust a grievance or complaint will first be made between the employee, his steward, and

his foreman. If the foreman should call or bring in any other Company representative into this discussion, the steward shall have the right to call or bring in the area committeeman. (The steward may phone the area committeeman or go to see him to discuss the grievance under such circumstances.)

Step 2: If the matter is not satisfactorily settled, the steward or the area committeeman shall reduce the grievance or complaint to writing within five (5) working days, specifying the nature of the grievance or complaint, shall identify the employee(s) involved, and in the case of a grievance, the contract provision(s) involved. The foreman shall within three (3) working days thereafter set forth his written answer and the matter shall be discussed at the next semi-monthly meeting between the shop committee and representatives of the Industrial Relations Department. Such meetings will be held at 2:00 P.M. on the day in question, or such other time as is mutually agreed to, but will be held only if there are grievances then pending; however, special meetings may be called by either party if a matter of immediate emergency is involved and such meeting must be held within three (3) working days of such call.

Step 3: If the matter is not satisfactorily settled, the Union may appeal within five (5) working days, and a meeting of the shop committee and representatives of the Industrial Relations Department shall be scheduled at which the Union's International Representative(s) or other representatives shall be present. The Company shall give the Union a written final answer within five (5) working days of such meeting.

Section 3. If a grievance is not satisfactorily adjusted under the above procedure, the Union may appeal the grievance to arbitration within twenty (20) days of receipt of the Third Step answer. The parties shall jointly request the Federal Mediation and Conciliation Service to submit a panel of five (5) arbitrators from which the Union shall

strike two (2) names, then the Company shall strike two (2) names, and the remaining arbitrator shall be named to hear the grievance.

(a) The arbitrator shall have no authority to change, alter, detract from or add to the provisions of this Agreement or agreements supplemental to this Agreement, his authority being limited to the interpretation of the terms of this Agreement.

(b) The award of the arbitrator shall be final and binding upon the parties.

(c) The Company and the Union shall each pay one-half (½) of the expenses of the arbitrator.

(d) The Company agrees to compensate such Union representatives and employee witnesses as may be required for the presentation of the case at their regular rates of pay for the time lost during working hours in connection with the arbitration proceedings. The Company agrees, further, that the time spent within the current workweek by such night shift representatives and employees as may be required at arbitration proceedings shall be considered as time worked and shall offset the need of work an equal number of hours, depending upon the prevailing hours, each day of the proceedings at which such representatives and/or employees must be present.

* * * * *

Section 4. Grievances relating to layoffs and rehirings in connection with the increase or decrease of the working force must be filed within five (5) working days from the effective date of the layoffs or rehirings. Alleged grievances on transfers or promotions (to higher rated jobs) must be filed within three (3) working days of the effective date of such transfers or promotions. Grievances involving suspension or discharge may be taken up directly at the Second Step of the grievance procedure and must be filed within five (5) working days after such action occurs.

* * * * *

Article VI.

Seniority.

Section 1. Seniority shall be defined as an employee's length of continued service with the Company at its Chicago plant identified in the preamble to this Agreement from his last date of hire.

* * * * *

Section 5. An employee shall forfeit his seniority if:

(a) He quits,

(b) He is discharged for just cause,

(c) He gives a false statement in obtaining a leave of absence,

(d) He is absent from work for five (5) consecutive working days without notifying the Company. Such absence must be for just cause. (The Company and Union agree that an absentee employee should notify the Company on the first day of his absence as to when he or she will report back to work, except where the failure of such notification is due to causes beyond the employee's control.)

(e) He fails to report for work within five (5) days after receiving written notice of recall to his original classification after a layoff, given by the Company by registered mail or telegram and addressed to the employee at his last known address appearing on the records of the Company, or

(f) He is on continuous layoff for a period equivalent to actual seniority for employees with two (2) years or less of seniority; he is on continuous layoff for a period of two (2) years for employees with more than two (2) years but less then four (4) years of seniority; he is on continuous layoff for a period equivalent to one-half (½) of actual seniority for employees with four (4) or more years of seniority.

* * * * *

Section 10. In the event the equipment of the plant or of any department, entirely or partially, is hereafter moved to another location of the Company, employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement covering production and maintenance employees at such location.

* * * * *

Article VII.

Layoffs and Recalls.

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Section 3. A layoff in excess of one (1) week shall constitute an indefinite layoff. When it becomes necessary to reduce the working force and/or curtail or eliminate any job classification on an indefinite basis, the following procedure shall govern:

(a) The youngest employee in the particular job classification involved shall be removed from the job classification. The working assignments of the employees remaining in the job classification shall be rearranged for the efficient operation of the jobs that are still operating.

(b) If the employee is removed from his classification under Paragraph (a), his qualifications will be reviewed, based upon his past experience, both at Acme Industrial and prior to his being hired at Acme Industrial, as stated on his application for employment. However, in the event that an employee since the date of hire at Acme Industrial has acquired additional skills, either through experience or schooling, this also will be reviewed and given consideration. His seniority will then be checked in the classification most nearly comparable to the classification from which he

was laid off, and he will displace a younger employee in that job classification, provided he has more seniority than that employee and is capable of doing the job.

(c) In the event of a reduction in force, an employee who is transferred from one classification to another classification shall, seniority permitting, be placed on the shift of his choice at the time of transfer.

(d) However, in the event the transfer under Paragraphs (b) and (c) above does not entitle the employee to the shift of his choice, he may exercise his rights to refuse this assignment and bump into a most nearly comparable classification, seniority permitting, in order to be placed on the shift of his choice.

(e) It is understood by both parties that a refusal to a particular job under the terms of Paragraph (d) above, does not deny the employee the right to recall into the same classification, seniority permitting.

(f) Employees who are subject to being down-graded as a result of the application of this Section may exercise the option of taking a voluntary layoff, provided that they shall only be recalled in line with their seniority to their classification and shift.

(g) In determining the employee's capability of doing the job, an employee shall be considered capable if he or she can perform the job in not more than twenty-four (24) working hours. However, if at the expiration of the twenty-four (24) hours, the employee has shown sufficient progress, the time period may be extended by negotiations between supervision and the committeeman. Where an employee has failed to meet the qualifications of the job classification to which he was transferred as provided above within the twenty-four (24) hour working period, the Company shall then select for him the next most comparable job classification which he can then perform; and if he cannot perform such job, then the Company shall select for him the next

most comparable job classification which he can then perform.

(h) After steps (a), (b), (c), (d) and (g) have been applied without placement, the employees will be laid off.

Section 4. Whenever it becomes necessary to increase the working force in any classification, the following procedure shall be followed:

(a) The Company will select the most senior employee from the following group: (i) all employees who had previously been reduced from the affected classification pursuant to Section 3 hereof, (ii) all employees then laid off from the plant who had previously been classified in the affected classification. Should the opening(s) not be filled from this group, then

(b) The Company will select an employee pursuant to the standards set forth in Article X.

(c) An employee on layoff who is offered an opening on an intermediate job classification and refuses such opening, shall forfeit his right to be recalled into any other intermediate classification. An intermediate job is deemed to be one which carries a lower rate of pay than the employee's home classification.

(d) Employees on layoff from the plant refusing a recall to their home job classification, regardless of shift, shall be terminated.

(e) Employees working in the plant, who refuse a recall to their home classification, regardless of shift, shall thereafter have no further recall right to such classification.

* * * * *

Article X.

Job Posting.

Section 1. (a) When new jobs are created or permanent vacancies occur, subject to the prior application of Article VII, Sections 4(a) and (b), such jobs shall be posted on a plantwide basis for a period of not less than two (2) working days.

(b) Should the Company wish to fill a position, vacancy in which has been caused by vacation or leave of absence, such opening shall be filled pursuant to the procedure set forth in Exhibit "D".

(c) The selection of employees for job openings shall be made on the basis of seniority, provided that ability is reasonably equal.

(d) Employees' bids for higher rated jobs will be unlimited, but bids for lower or same rated jobs will not be granted more than once a year.

(e) The transferring of an employee to a job opening shall be made not later than one week after he has been selected. If, for any reason, the transfer cannot be made within this fixed period, the Company and the Union will mutually agree to a predetermined period of time. The Company shall be permitted to designate an employee to fill the vacant job irrespective of seniority until the posting procedure has been completed.

(f) When a permanent job is open and an employee with questionable ability has bid and is selected by the Company, the Company, by mutual agreement with the Union, may train such an employee for a period not to exceed sixty (60) days to determine whether he has the qualifications for the job.

Section 2. The Company agrees to grant all of its employees an equal opportunity to bid on all job openings, and

in no way shall discourage such employees from bidding on job openings or discriminate against the employee for such bidding. Any claims of personal prejudice, favoritism, or discrimination in connection with the selection of employees for job openings may be taken up as grievances.

Section 3. Employees classified and paid in the "C" grade of any classification, shall automatically be upgraded to "B" grade within thirty (30) days of entry into the "C" grade.

Section 4. Employees who bid for such job openings but fail to qualify, shall return to their former job, seniority permitting. Should seniority not permit such retransfer, then the employee's seniority rights shall be as set forth in Article VII, Section 3. Such employee may not bid again for such position for a period of one (1) year.

Section 5. (a) When a job is posted while employees are on layoff, the Company and Union shall review the qualifications of those laid off to determine which, if any, shall be notified of the opening. An employee so notified shall contact the Company within forty-eight (48) hours.

(b) The qualifications of employees who are on emergency or sick leave, for whom such opening is a promotional (higher rated) opportunity, shall also be jointly reviewed to determine which, if any, shall be notified of the opening. Such employee must be available for notification and acceptance within a forty-eight (48) hour period, and must be available for employment within one (1) calendar week of such notification or such additional period as the parties agree upon.

* * * * *

Article XVII.

General.

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Section 3. No member of the supervisory or engineering force shall perform work normally performed only by employees in the unit which would cause a bargaining unit employee to be sent home, or not to be recalled. It is understood that foremen or engineering personnel may perform work for purposes of instruction or training of employees, testing of new or faulty machines or methods, or assisting employees in making set-ups, or in emergencies where regular employees are not immediately available. Grievances arising hereunder shall immediately be taken up at the Third Step.

* * * * *

Article XVIII.

No Strike—No Lockout.

Section 1. The Union and the Company have attempted to provide in this Agreement a complete and peaceful procedure for the handling and final disposition of all disputes and grievances which may arise during the life of this Agreement. Therefore, it is mutually agreed that there shall be no lockouts, strikes, stoppages of work, curtailment and/or interference with production unless otherwise provided in this Agreement.

* * * * *

Article XIX.

Duration of Agreement.

Section 1. This Agreement supersedes and cancels all previous agreements between the parties and constitutes the entire agreement between the parties, concluding bargaining for its term.

Section 2. This Agreement, except as otherwise herein provided, shall become effective upon the date of execution and shall continue in full force and effect for a period of three (3) years and from year to year thereafter, unless notice in writing to terminate, amend or modify is given at least sixty (60) days prior to the expiration date. Should neither party give such sixty (60) day notice, this Agreement shall remain in full force and effect until notice is given and for sixty (60) days thereafter.

GENERAL COUNSEL'S EXHIBIT NO. 4-A.

Grievance or Complaint Form.

Step 1.

Grievance No. 54. **Date 1/13/64**

Nature of Grievance or Complaint: The Union contends that the Company is in violation of the articles listed below:

The Company moved equipment, mainly a Kleerman machine from the plant. This machine was used in the Tool Room, Dept. 51 as a Jig Bore. The work that was performed on this and other machines by bargaining-unit employees in Dept. 51 is obviously being done elsewhere. This is depriving the Tool Room employees of their rightful job rights under the existing agreement.

No notification was given to the Union at the time that this took place. Steward and Committeeman Rudy Rich discussed this issue with Foreman P. Steelhammer, after which this foreman merely stated that the Company was not in violation of the contract. This was his answer after he had discussed the matter with the Industrial Relation's Department.

Contract provision(s) involved (if grievance):

Article VI, Section 10 and
Article I, Sections 1, 2 and 3.

Employee(s) Aggrieved:

Tool Room Employees and Local #310 UAW-AFL-CIO.

Adjustment Requested:

That the Company live up to their agreement and give employees their full job rights, also from the date of the filing of this grievance employees deprived of employment by the action of the Company be compensated fully.

Union signature Rudolph Rich.

Foreman's answer:

There was no violation of the contract. Grievance denied.

Date 1-13-64

Foreman's signature
Paul A. Steelhammer.

Settled ☐ **Appealed to Industrial Relations ☒**

Date 1-14-64

General Counsel's Exhibit 4-A (Back Page).

Step 2 Answer.

Grievance No. 54

Industrial Relations Disposition:

The machine involved was moved 10-18-63. This complaint was filed almost 3 months later. No employee was working on the machine at the time of its removal. No employees were reduced in classification or laid off as a result of the machine's removal. There was no contract violation.

Date January 21, 1964

Industrial Relations Manager
T. J. Bellush.

Settled ☐ **Appealed to Step 3 ☒**

GENERAL COUNSEL'S EXHIBIT NO. 4-B.

Grievance or Complaint Form.

Step 1.

Grivance No. 57 Date 1/31/64

Nature of Grievance or Complaint: The Company violated the below mentioned articles and sections of our agreement when they moved equipment, namely Jeweler's Lathes from the plant. This has been done while there are bargaining unit employees reduced to lay-off status. Also, the Company has farmed out work that would normally be done on the Jeweler's Lathe. The combination of both violations have left the employees normally working in the Jeweler's Lathe classification jobless.

When this was first discussed with C. Delonghi, he stated that the lathes were not moved. However, several employees have confirmed the fact that they have been moved from the plant.

Contract provision(s) involved (if grievance):

Article I, Section 3, and
Article VI, Section 10.

Employee(s) Aggrieved:

Local #310 UAW-AFL-CIO.

Adjustment Requested:

That the Company discontinue the violations and that at least one employee who would be regularly assigned to the above mentioned job be compensated for lost wages from the date of the filing of this grievance.

Union signature

Victor F. Scholowski.

GENERAL COUNSEL'S EXHIBIT NO. 4-C.

Grievance or Complaint Form.

Step 1.

Grievance No. 58 Date 1/31/64

Nature of Grievance or Complaint: The Company is in violation of the articles mentioned. They moved equipment from the plant, namely a multiple drill press which adversely affects bargaining unit employees who are reduced to lay-off status. The work that has been done in the past on this machine is now being farmed out.

When this was discussed with foreman E. Kuczek he stated that this machine was sold but no proof to confirm this was offered.

Contract provision(s) involved (if grievance):
Article I, Sections 1, 2 and 3.
Article VI, Section 10

Employee(s) Aggrieved:
Local #310.

Adjustment Requested:
That the Company fulfill their obligations under the as per Article VI, Section 10 and discontinue the farming out of work that can and should be done in the plant at Acme.

Union signature
Victor F. Scholowski.

GENERAL COUNSEL'S EXHIBIT NO. 4-D.

Grievance or Complaint Form.

Step 1.

Grievance No. 60 Date 2/10/64

Nature of Grievance or Complaint: On January 27, 1964, the Union Steward, Rudolph Rich discussed the removal of Thread Grinding Machines from the shop with Foreman Eddie T. of the grinding department of the second floor.

Upon receiving no explanation from the Foreman, Eddie T. as to the Company's reason for their removal, the Union Steward requested permission twice to file the first written stage of the grievance procedure and was delayed both times.

This grievance was written in the home of Steward Rudolph Rich, since the Industrial Relations Manager, Tom Bellush issued a new oral directive directly to the Vice-President, Rudolph Rich and to the President, William Antalek of Local #310. Any and all grievances originating from the Union are not to be written, according to this directive, on the premises of Acme Industrial Co. during working hours.

A direct violation of the contract is hereby being charged against the company in both instances.

Contract provision(s) involved (if grievance):

Article I—Sections 1, 2 and 3.
Article III—Sections 4, 5 and 6.
Article IV—Sections 1, 2 and 3.
Article VI—Section 10.

Employee(s) Aggrieved:

1. Local #310 UAW-AFL-CIO.
2. Displaced employees.
3. Union Officer, Rudolph Rich.

Adjustment Requested:

The employees who are being displaced by the removal of these machines be compensated for lost wages since the removal took place, also that the Company comply with the Grievance Procedure pertaining to the writing of grievances during the regular working hours and that the steward, in this instance, Rudolph Rich be compensated for the time spent in the writing of this grievance.

Union signature
Rudolph Rich.

GENERAL COUNSEL'S EXHIBIT NO. 4-E.

Grievance or Complaint Form.

Step No. 1.

Grievance No. 61 Date 2/10/64

Nature of Grievance or Complaint: This grievance is being written in regards to the violation of the Company's action regarding the removal of the two (2) O. D. Grinding Machines on Thursday January 30, 1964 from the premises.

In our written Contract with the Company, we feel that the Company is obligated to meet with the Shop Committee of Local #310 and negotiate any and all machinery being removed, transferred, sold, loaned, rented, etc.

According to a new directive by the Industrial Relations Manager, Tom Bellush, this grievance and all future griev-

ances as of February 3, 1964 are to be written outside of the shop premises, at no expense to the Company.

This is in direct violation of past practice since the inception of Local #310 at Acme Industrial Company.

Contract provision(s) involved (if grievance):

Article I, Section 1, 2 and 3.
Article III, Section 4, 5 and 6.
Article IV, Section 1, 2 and 3.
Article VI, Section 10.

Employee(s) Aggrieved:

1. Local #310 UAW-AFL-CIO.
2. Displaced employees.
3. Union Officer, Rudolph Rich.

Adjustment Requested:

1. The Company comply with the above mentioned Articles and sections of our agreement in their entirety.
2. Employees displaced by the removal of machines be compensated for lost wages.
3. The Union Officer, Rudolph Rich, be compensated for the time involved in writing of this grievance on his own time.

Union signature

Rudolph Rich.

GENERAL COUNSEL'S EXHIBIT NO. 4-F.

Grievance or Complaint Form.

Step 1.

Grievance No. 62 Date 2/10/64

Nature of Grievance or Complaint: On Monday, January 27, 1964 the Union Steward, Rudolph Rich discussed the removal of the three Thread Grinding Machines from the shop with Foreman Eddie T. of the grinding Department on the second floor.

Upon receiving no explanation from the foreman as to the Company's reason for their removal, the Union Steward requested permission to begin processing the grievance according to Article IV, Section 2, Step 2 as outlined in the contract.

The foreman unreasonably delayed this request until the following week. This action was an attempt by the foreman to nullify the right of the steward to file this grievance within the five day period as outlined in the contract. Permission was requested twice during this five day period. Grievance time was requested of the Foreman by the Union Steward on Mon. 2/3/64, to file a grievance regarding the unreasonable delay in granting permission to file a grievance on the removal of the Thread Grinding Machines. Personnel Director, Tom Bellush made it unmistakably clear in the presence of foreman Eddie T. and Steward R. Rich that all future grievances were to be written outside of the shop and at no expense to the Company.

Contract provision(s) involved (if grievance):

Article I, Sections 1 and 2.

Article III, Sections 4, 5 and 6, also Article IV, Sections 1, 2 and 3.

Employee(s) Aggrieved:

1. Local #310 UAW-AFL-CIO.
2. Steward, Rudolph Rich.

Adjustment Requested:

1. That all grievances be permitted to be written as per contract. (Article III, Sections 4, 5 and 6, also Article IV, Sections 1, 2 and 3.
2. That all future grievances be allowed to be processed without unjust delay.
3. That Steward Rudolph Rich be re-imbursed for time involved in the writing of this grievance.
4. That the Company negotiate immediately with the Union as to removal of these machines.

Union Signature

Rudolph Rich.

GENERAL COUNSEL'S EXHIBIT NO. 4-G.

Grievance or Complaint Form.

Step 2.

Grievance No. 63 Date 3/2/64

Nature of Grievance or Complaint: On Wednesday Feb. 19, 1964, one Hauser Jig Borer Machine from the Tool Room was moved out of the plant.

In our written Contract with the Company, we feel the Company is obligated to meet with the Shop Committee of Local #310 and negotiate any and all machinery being removed from the plant when it displaces or denies employment to Bargaining Unit Employees

According to a new directive by the Industrial Relations Manager, Thomas Bellush, this grievance, and all future

grievances as of Feb. 3, 1964, are to be written outside of the shop. This is in direct violation of past practice since the inception of Local #310 at Acme Industrial Company and a direct violation of our Contract.

Contract provision(s) involved (if grievance):

Article I, Section 1, 2 and 3.
Article III, Section 4, 5 and 6.
Article IV, Section 1, 2 and 3.
Article VI, Section 10.

Employee(s) Aggrieved:

1. Local #310, UAW.
2. Rudolph Rich, Committeeman.
3. Tool Room employees, Frank Orpzodek, Wilburt Schmuldee, John Matusko, Ted Wendell, John Alexander and Pete Sasso.

Adjustment Requested:

1. The Company comply with the above articles and sections of our agreement in their entirety.
2. The Union Officer, Rudolph Rich, be compensated for time involved in writing this grievance on his own time.
3. Employee displaced or denied employment by the removal of this Hauser Jig Borer Machine be compensated for lost wages.

Union Signature

Rudolph Rich.

GENERAL COUNSEL'S EXHIBIT NO. 4-H.

Grievance or Complaint Form.

Step 2.

Grievance No. 64 **Date 3/3/64**

Nature of Grievance or Complaint: This grievance is being written in regards to the violation of the Co's. action regarding the removal of one Chucker from the plant.

In our written Contract with the Co., we feel the Company is obligated to meet with the Shop Committee of Local #310 and negotiate any and all machinery being removed from the plant when it displaces or denies employment to Union employees.

The Company's action adversely affects Bargaining Unit Employees' job rights.

Also, the Company denied me, Steward, Victor Sokolowski my rights under our contract to write this grievance during working hours.

Contract provision(s) involved (if grievance):

Article I, Section 1, 2 and 3.
Article III, Section 4, 5 and 6.
Article IV, Section 1, 2 and 3.
Article VI, Section 10.

Employee(s) Aggrieved:

1. **Displaced employees.**
2. **Local #310, UAW.**
3. **Victor Sokolowski, Union Steward.**

Adjustment Requested:

1. **Employees displaced or denied employment by the removal of this machine be compensated for lost wages.**

2. The Company comply with the above Articles and Sections of our agreement in their entirety.
3. The Union Officer, Victor Sokolowski, be compensated for the time involved in writing this grievance on his own time.

Union Signature

Victor F. Sokolowski.

GENERAL COUNSEL'S EXHIBIT NO. 4-I.

Grievance or Complaint Form.

Step 2.

Grievance No. 65 Date 3/3/64

Nature of Grievance or Complaint: The Union Steward, Victor Sokolowski discussed the Company's removal from the Shop of the Straddle Mill Machine with Foreman Eddie Kuczek, of the first floor, Plant #1.

Upon not receiving a satisfactory explanation from the Foreman as to the Co's. reason for the removal, the Union Steward requested permission to begin processing a grievance. This right was denied him.

Foreman, E. Kuczek stated that this grievance and all future grievances were to be written outside of the Shop premises, not during working hours. These were his orders from the Industrial Relations Department.

Contract provision(s) involved (if grievance):

Article I, Section 1 and 2.
Article III, Section 4, 5 and 6.
Article IV, Section 1, 2 and 3.

Employee(s) Aggrieved:

1. Local #310, UAW.
2. Victor Sokolowski, Union Steward.

Adjustment Requested:

1. Employees displaced or denied employment by the Co's. action be compensated for lost wages.
2. That all grievances be permitted to be written as per Contract.
3. That Steward, Victor Sokolowski, be reimbursed for writing this grievance on his own time.
4. That the Company negotiate immediately with the Union on the removal of the Straddle Machine.

Union Signature

Victor F. Sokolowski.

GENERAL COUNSEL'S EXHIBIT 4-J.

Grievance or Complaint Form.

Step 2.

Grievance No. 66 Date 3/3/64

Nature of Grievance or Complaint: This grievance is being written in regards to the violation of the Company's action regarding the removal of four Single Spindle Drill Press Machines.

In our written Contract with the Company, we feel the Company is obligated to meet with the Shop Committee of Local #310 and negotiate any and all machinery being removed from the plant when it displaces or denies employment to Union Employees.

According to new orders by the Industrial Relations Manager, Tom Bellush, this grievance and all future grievances as of February 3, 1964, are to be written outside of the Shop premises. This is in direct violation of past practice since the inception of Local #310 at Acme Industrial Co. and a direct violation of our Contract.

Contract provision(s) involved (if grievance):

Article I, Section 1, 2 and 3.
Article III, Section 4, 5 and 6.
Article IV, Section 1, 2 and 3.
Article VI, Section 10.

Employee(s) Aggrieved:

1. Edward Korus.
2. Local #310, UAW.
3. Victor Sokolowski, Union Officer.

Adjustment Requested:

1. Employees displaced or denied employment by the removal of machines be compensated for lost wages.
2. The Company comply with the above Articles and Sections of our agreement in their entirety.
3. The Union Officer, Victor Sokolowski, be compensated for the time involved in writing this grievance on his own time.

Union Signature

Victor F. Sokolowski.

GENERAL COUNSEL'S EXHIBIT NO. 4-K.

Grievance or Complaint Form.

Step 2.

Grievance No. 67 Date 3/3/64

Nature of Grievance or Complaint: This grievance is being written in regards to the violation of the Company's action regarding the removal of four Traubs Automatic Screw Machines from the plant at Acme Industrial Company.

In our written Contract with the Company, we feel the Company is obligated to meet with the Shop Committee of

Local #310 and negotiate any and all machinery being removed from the Plant when it displaces or denies employment to Union Employees.

According to a new directive by the Industrial Relations Manager, Tom Bellush, this grievance, and all future grievances as of February 3, 1964, are to be written outside of the Shop premises. This is in direct violation of past practice since the inception of Local #310 at Acme Industrial Co. and a violation of our contract.

Contract provision(s) involved (if grievance):

Article I, Section 1, 2 and 3.
Article III, Section 4, 5 and 6.
Article IV, Section 1, 2 and 3.
Article VI, Section 10.

Employee(s) Aggrieved:

1. Local #310, UAW.
2. Roger Hale, Edward Clover and William Flowers.
3. Victor Sokolowski, Union Officer.

Adjustment Requested:

1. The Company comply with the above Articles and Sections of our Agreement in their entirety.
2. Employees displaced or denied employment by the removal of machines be compensated for lost wages.
3. The Union Officer, Victor Sokolowski, be compensated for the time involved in writing this grievance on his own time.

Union Signature

Victor F. Sokolowski.

GENERAL COUNSEL'S EXHIBIT NO. 5.

April 3, 1964

Acme Industrial Company
222 North Laflin
Chicago, Illinois
Attention: Mr. T. J. Bellush

Dear Mr. Bellush:

The Union requests that the Company furnish the following information at the earliest possible date:

1. The approximate dates when each piece of equipment was moved out of the plant.
2. The place to which each piece of equipment was moved and whether such place is a facility which is operated or controlled by the Company.
3. The number of machines or equipment that was moved out of the plant.
4. What was the reason or purpose of moving the equipment out of the plant.
5. Is this equipment used for production elsewhere.

The information we are asking for is essential to the Union for the servicing and administration of the current contract.

Sincerely,

William Antalek,
President, Local 310 UAW.

WA:bt

GENERAL COUNSEL'S EXHIBIT NO. 6.

(Letterhead of Acme Industrial Company, 200-222 North Laflin Street, Chicago 7, Illinois.)

April 16, 1964

Mr. William Antalek, Pres.
Local Union 310, UAW-AFL-CIO
222 N. Laflin Street
Chicago, Illinois 60607

Dear Mr. Antalek:

We were unaware that our relationship with your union had reached the stage when correspondence such as your letter of April 3, 1964 has become necessary. However, while we are of the opinion that it is not the scope and complexities of our relationship that dictates your use of this medium but, rather, that you are now attempting to build an unfair labor practice charge case, we shall, nevertheless, hereby respond.

We presume that your questions relate to Article VI, Section 10 of our labor agreement, although you do not specify the relevance and/or utility of the questions. We note that this section establishes a right of transfer, with certain limitations, to employees ". . . who are subject to reduction in classification or layoff as a result of . . ." the movement of any equipment to another location of the Company. We also note that under Section 4 of Article IV of our labor agreement, grievances relating to layoffs must be filed within five (5) working days thereafter, and grievances relating to transfers must be filed within three (3) working days thereof.

We are aware of no layoffs nor of any reductions in any classification within five (5) working days prior to your

letter, and we, therefore, conclude that there is no proper basis upon which your request for information may lie. You have available all the information you need to determine whether or not any employees' rights are being violated. Furthermore, the broad scope of your questions is indicative of a fishing and harassment expedition rather than a true desire for necessary information.

Please be assured that we shall continue to cooperate with your union in providing whatever proper information you request for your aid in servicing and administering our labor agreement.

Very truly yours,

Acme Industrial Company,
T. J. Bellush,
Industrial Relations Mgr.

RESPONDENT'S EXHIBIT NO. 2.

Collective Bargaining Agreement

This Agreement entered into this 5th day of August, 1959, between

Acme Industrial Company, 200-222 North Laflin Street, Chicago, Illinois, or its successor (hereinafter called the "Company"),

and the

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, and its Amalgamated Local Union No. 310 (hereinafter called the "Union");

Witnesseth:

• • • • •

Article VI.

Seniority.

• • • • •

Section 7. In the event the plant or any department, entirely or partially, is moved to another location, employees working in the plant or in such department may transfer to the new location with full rights and seniority.

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[fol. 128]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965—SEPTEMBER SESSION, 1965

No. 15045

ACME INDUSTRIAL CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

October 6, 1965

Before DUFFY, CASTLE, and MAJOR, *Circuit Judges.*

CASTLE, *Circuit Judge.* This case is before the Court upon the petition of Acme Industrial Company to review and set aside, and upon the cross-petition of the National Labor Relations Board to enforce, an order of the Board issued against the Company. The Board's decision and order are reported at 150 NLRB No. 144.

The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by failing to comply with the Union's [1] request for information regarding the removal of machinery from the Company's Chicago, Laflin Street, plant. The Board's order requires the Company to cease and desist from re-

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[1] Amalgamated Local Union No. 810, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.

[fol. 129] fusing to bargain with the Union by refusing to furnish it with information concerning the removal of equipment and machinery from the plant; or from in any like or related manner infringing on its employees' Section 7 rights. Affirmatively, the Company is required, upon request, to furnish the Union information concerning the removal of equipment and machinery from its plant, and to post designated notices.

The Company and the Union were parties to a collective bargaining agreement which expired on June 30, 1962. In October 1962, the Company employees represented by the Union went out on a strike which terminated with execution of a new agreement in April 1963. Although the Company operates several plants, the new agreement applied solely to its Laflin Street plant in Chicago, Illinois. At the time of the strike, about 190 employees comprised the plant bargaining unit. Immediately after the Company resumed operations following the strike, a number of employees were laid off. Between April 1963 and the date of the unfair labor practice hearing in late August 1964, the number of employees on layoff status ranged between 30 and more than 75. During this period, the status of between 7 and 9 employees was changed from layoff to termination under provisions of the agreement that continuous layoff for given periods effected a loss of seniority.

The 1963 collective bargaining agreement included a no-strike clause, a grievance and arbitration clause embracing "a difference of opinion with respect to the meaning and application of the terms of this agreement", and subcontracting and work transfer clauses containing the following provisions:

Article 1.

Section 3. It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company . . .

Article VI

Section 10. In the event the equipment of the plant or of any department, entirely or partially, is [fol. 130] hereafter moved to another location of the Company, employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement covering production and maintenance employees at such location.

On or about January 8, 1964, the Union, upon discovering that machinery was being removed from the Laflin Street plant, began to seek information concerning this through inquiry by its stewards. The steward in each of the several instances invoked asked why the machinery was being removed and where it was being moved. Company representatives answered that no violation of the contract was involved and refused to give the information. The Union submitted 11 grievances concerning removal of machinery and the subcontracting of work.

On April 3, 1964, the president of the Union wrote a letter to the Company requesting information concerning the approximate date when each piece of equipment was moved out of the plant; the place to which the equipment was moved and whether such place is a facility which is operated or controlled by the Company; the number of machines or equipment moved out of the plant; the reason or purpose for moving the equipment; and whether the equipment is used for production elsewhere. The Company refused to furnish the information requested.

All of the 11 grievances were still pending at the time of the August 1964 hearing on the unfair labor practice charge. The Board found that the information requested was "necessary in order to enable the Union to evaluate intelligently the grievances filed and to determine whether such grievances were meritorious, and whether to press for arbitration". The Board reasoned that the denial of the information deprives the Union of an opportunity to know whether jobs and machinery had been moved out

of the plant under circumstances entitling employees, especially those in layoff status, to follow the jobs or entitling the Union to grieve over improper subcontracting. The Board concluded that the Company was under a statu- [fol. 131] tory duty to furnish the information for the reason that by virtue of the provisions of Section 8(a) (5) and (1) and 8(d) of the Act an employer is under a statutory duty to furnish his employees' bargaining representative information which is relevant to a grievance or to the administration or policing of the contract.

But, apart from provisions such as the subcontracting and work transfer clauses of the agreement here involved it is not apparent that the removal of machinery from an employers plant would have relevance to a possible grievance or to contract administration or policing. The nature of the subject is such that it neither necessarily nor presumptively relates to wages, hours, or other terms or conditions of employment. Moreover, the agreement provided that differences with respect to the meaning or application of the provisions concerning the contracting out of work and work transfers are subject to final and binding compulsory arbitration. And the grievance procedures prerequisite to arbitration had been invoked and were pending. The factors bearing on a determination of the relevancy of the information requested are interrelated with a construction and application of the contract provisions. The latter is a matter exclusively reserved for the arbitrator. Under the circumstances here presented Board intervention to make the determination of relevancy in the light of its independent interpretation of the meaning and application of the contract provisions contravenes the policy expressed in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, concerning the priority which should be accorded the grievance and arbitration procedures and machinery provided for in the contract. It was there pointed out (363 U.S. 581) that the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government and constitutes a part of the continuous collective bargaining process.

The arbitrator may require that he be furnished with information relevant to the resolution of the difference

submitted. Under the rationale of *United Steelworkers, supra*, recourse to the Board under such circumsances as are here presented appears to constitute a refusal to participate in the continued collective bargaining process afforded by the grievance and arbitration procedures pre-
[fol. 132] scribed. In any event, enforcement of the Board's order in the posture of this case would in our judgment contravene the national policy embodied in Section 203(d) of the Labor-Management Relations Act (29 U.S.C.A. § 173) that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement". And, "[t]hat policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play". *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 566. Courts "have no business . . . determining whether there is particular language in the written instrument which will support the claim" (*ibid.*, 568). The declared statutory policy, and the judicial admonitions addressed to the courts, are equally applicable to the Board. Where the determination of the relevancy of information necessarily involves factors interrelated with or dependent upon construction of the substantive provisions of the labor agreement, and those provisions are the bases of pending grievances already submitted under the grievance and arbitration procedures of the agreement, Board intervention in the guise of determining and enforcing the peripheral matter of the duty to furnish information requested contributes nothing to any objective of the Act and in our opinion is improper. The order clashes with the policy of effectual achievement of contractual arbitration.

The Board's order is set aside and its enforcement is denied.

ORDER SET ASIDE AND
ENFORCEMENT DENIED

* * * *

[fol. 133]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15045

Before:

HON. F. RYAN DUFFY, Circuit Judge
HON. LATHAM CASTLE, Circuit Judge
HON. J EARL MAJOR, Circuit Judge

ACME INDUSTRIAL CO., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for review of an order of the National Labor Relations Board.

JUDGMENT—October 6, 1965

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board and the answer and request for enforcement of said order, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is hereby ordered by this Court that the order entered in this cause by the National Labor Relations Board on February 1, 1965, be, and the same is hereby set aside, and enforcement of said order is denied, in accordance with the opinion of this Court filed this day.

[fol. 134]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 135]

SUPREME COURT OF THE UNITED STATES

No. 876, October Term, 1965

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ACME INDUSTRIAL CO.

ORDER ALLOWING CERTIORARI—February 21, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ACME INDUSTRIAL CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 6, 1965.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 13–18) is not yet officially reported. The Board's decision and order (J.A. 26–33)[1] are reported at 160 N.L.R.B. No. 144.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1965 (Appendix A, *infra*, p. 19). This

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[1] "J.A." refers to the joint appendix in the court below; copies have been filed with the petition.

Court has jurisdiction under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)).

QUESTION PRESENTED

Whether it is a refusal to bargain collectively, in violation of Section 8(a)(5) of the National Labor Relations Act, for an employer to decline to furnish the union with information relevant to a grievance until the need for the information has been determined in an arbitration proceeding.

STATUTE INVOLVED

The relevant statutory provisions are set forth in Appendix B, *infra*, pp. 21–22.

STATEMENT

The company (a manufacturer of tools and metal products) and the union[1] are parties to a collective bargaining agreement applicable to the employees at the company's Laflin Street plant in Chicago. The contract contains, among other provisions, a recognition clause, in which the company recognizes the union as the representative of all of the company's production and maintenance employees and certain other classes of employees (J.A. 95); a subcontracting clause, under which the company agrees "not to subcontract work which is normally performed by employees in the bargaining unit where this will result in the layoff of employees or prevent the recall of

[1] Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.

employees who would normally perform this work for the Company" (J.A. 27, 96); and a work-transfer clause, which provides that if equipment of the plant or of any department is moved to another company location "employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority" (J.A. 27, 102). It also contains a grievance procedure, grievance being defined in the contract as "a difference of opinion with respect to the meaning and application of the terms of this Agreement" (J.A. 90).

The grievance procedure consists of the following steps: (1) the employee, his steward, and his foreman first attempt to adjust the grievance; (2) if the matter is not satisfactorily settled, the steward then submits the grievance in writing, and the matter is discussed between the union's shop committee and representatives of the company's industrial relations department; (3) if there is still no satisfactory settlement, the union may "appeal" to the industrial relations department and may obtain the assistance of the union's international representative; (4) finally, the union may "appeal" the grievance to an arbitrator whose award "shall be final and binding upon the parties."[1] (J.A. 98–100.)

[1] However, the "arbitrator shall have no authority to change, alter, detract from or add to the provisions of this Agreement * * *, his authority being limited to the interpretation of the terms of this Agreement" (J.A. 100).

On or about January 8, 1964, the union discovered that machinery was being removed from the Laflin Street plant. It sought through its stewards information about the removal. The stewards asked foreman why the machinery was being removed and where it was being relocated. The foreman replied that there had been no violation of the contract and that the company, therefore, was not obliged to furnish this information (J.A. 27).[4] Between January 13 and March 3, 1964, the union filed 11 grievances relating to the removal of machinery and the subcontracting of work at the plant, charging that the company had violated the recognition, subcontracting, and work-transfer clauses of the contract (J.A. 27, 109–123).

On April 8, 1964, the president of the union wrote a letter to the company requesting information concerning the date on which each piece of equipment was moved out of the plant; the place to which the equipment was moved, and whether such place was a facility owned or controlled by the company; the number of machines or equipment moved; the reason or purpose for the move; and whether the equipment was used for production elsewhere. The letter as-

[4] For example, Rudolph Rich, the union's vice president and a steward, asked Foreman Steelhammer "if he would give me, as a union representative, the information that we were aware of the fact that machinery was being moved out of the plant which without this information forthcoming we were unable to continue—or even originate the filing of a grievance" (J.A. 64). Steelhammer, after checking with Industrial Relations Manager Bellush, advised Rich that "the Company felt that they were not in violation of the contract and, therefore, they did not feel compelled to give the union any definite answer as to why the machine was moved or where" (J.A. 65).

serted that this information was "essential to the Union for the servicing and administration of the current contract."[1] (J.A. 27–28, 124.) By letter of April 16, 1964, the company declined to furnish this information, on the grounds (among others) that the union had "available all the information [it needed] to determine whether or not any employees' rights are being violated" and that its questions were "indicative of a fishing and harassment expedition" (J.A. 28, 125–126). The union, alleging that the company's refusal to furnish the requested information constituted a refusal to bargain, collectively, in violation of Section 8(a)(5) of the National Labor Relations Act, filed unfair labor practice charges with the Board, and a complaint was issued (J.A. 2–8).

After a full evidentiary hearing, the Board found that "the information sought by the Union was necessary in order to enable the Union to evaluate intelligently the grievances filed and to determine whether such grievances were meritorious, and whether to press for arbitration" (J.A. 29). It further found "that the contract does not contain a clause dealing specifically with the furnishing of information necessary and relevant to the processing of grievances or any other clause by which the union waives its statutory right to such information" (*ibid.*). The Board concluded that in these circumstances the bargaining obligation imposed by Section 8(a)(5) of the Act required the company to furnish the information sought by the Union, and that by failing to do so the company had violated that obligation (*ibid.*). The Board ordered the company to provide the union, upon request, with

"information concerning the removal of equipment and machinery from its plant" (J.A. 30–31). The court of appeals, however, believing that the union's request for information should have been resolved under the contract grievance and arbitration procedure, denied enforcement of the Board's order (Appendix A, *infra*, pp. 13–18).

REASONS FOR GRANTING THE WRIT

Review by this Court is necessary to resolve a conflict among the circuits on a question of importance in the administration of the federal labor laws, decided erroneously below.

1. There can be no disputing the general proposition that a union designated to serve as the collective bargaining representative of the employees in a particular bargaining unit is entitled to such wage and related information in the employer's possession as the union may need in order to discharge its representation duties intelligently and effectively, and that an employer who refuses to supply such information to the union violates his obligation under Section 8(a)(5) of the National Labor Relations Act to "bargain collectively with the representatives of his employees."[*] The union cannot bargain effectively if

[*] *National Labor Relations Board* v. *Woolworth Co.*, 352 U.S. 938, reversing 235 F. 2d 319 (C.A. 9); *National Labor Relations Board* v. *Item Co.*, 220 F. 2d 956 (C.A. 5), certiorari denied, 350 U.S. 836; *J. I. Case Company* v. *National Labor Relations Board*, 253 F. 2d 149 (C.A. 7); *National Labor Relations Board* v. *Whitin Machine Works*, 217 F. 2d 593 (C.A. 4), certiorari denied, 349 U.S. 905; *Boston Herald-Traveler Corp.* v. *National Labor Relations Board*, 223 F. 2d 58 (C.A.1).

denied access to pertinent facts and data within management's possession. Nor is there any doubt that the union's representation duties in this case included the processing of grievances under the contract procedure,[6] and that the information sought was pertinent to determining whether the contract had been violated and whether the employees, therefore, were entitled to relief under the grievance procedure.[7]

Nevertheless, the court below held that a refusal to furnish information is not an unfair labor practice where the information sought relates to a matter which can be (and here was) presented as a grievance under the grievance and arbitration procedure contained in the collective bargaining agreement. The court reasoned that in such a case a Board proceeding undermines the private settlement machinery established by the agreement, and that the union should ask the arbitrator to compel the employer to furnish any needed information. The court's holding is in direct conflict with decisions of the Third and Sixth Circuits, which have held that, at least where, as in the present case, the refusal to furnish such information itself is not a grievance under the contract, the em-

[6] This is obvious on the face of the collective bargaining contract (see p. 3, *supra*).

[7] The information was sought with respect to possible violations of the recognition, subcontracting, and work-transfer clauses of the contract. There is no doubt that questions of compliance with those clauses would involve "a difference of opinion with respect to the meaning and application of the terms of this Agreement" (J.A. 98), and thus constitute "grievances." Indeed, the subcontracting clause specifically provided that violation thereof "will be subject to the grievance procedure" (J.A. 96).

ployer is required to furnish the information. *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746 (C.A. 6), certiorari denied, 376 U.S. 971; *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 71–72 (C.A. 3).[8]

2. The question is an important and recurrent one. The Board is constantly asked to decide whether Section 8(a)(5) of the Act requires the production of

[8] The Fifth and Ninth Circuits have held, seemingly in accord with the court below, that requests for information must be channeled through the grievance and arbitration procedure established by the contract. *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569 (C.A. 5); *Square D Co.* v. *National Labor Relations Board*, 332 F. 2d 360 (C.A. 9). These decisions, however, are distinguishable from the case at bar and from the Third and Sixth Circuit cases, for they turn on the principle—which the Board is challenging in a petition for certiorari to be filed shortly in *National Labor Relations Board* v. *C & C Plywood Corp.*, but which is not directly involved in the present case—that the Labor Board is without power to act on an unfair labor practice charge that turns on a question of contract interpretation. In *Sinclair* and *Square D*, the employer contended that the contract gave him unilateral control over the subject for which the information was sought (reductions in force for lack of work in *Sinclair* and a group-incentive plan in *Square D*), and the courts held that in these circumstances the question of relevance of the information—and hence whether the refusal to supply it was an unfair labor practice—turned on whether the contract in fact left the matter complained of to the employer's unilateral control. Since, in the courts' view, this raised a question of construction for the arbitrator to determine, it was appropriate that he also determine the relevance of the information. Here, on the other hand, there is no issue of contract construction which must be resolved in order to determine the relevance of the information sought to the union's duties, since the company made no claim that the matters complained of were within its unilateral control and thus not cognizable under the contract grievance and arbitration procedure (see n. 7, *supra*).

particular information sought by union or employer,* and innumerable collective bargaining agreements contain grievance procedures; all are potentially affected by the decision of the court of appeals in this case. Also involved here is the fundamental question of the extent to which the Board's remedial powers should be deemed abrogated or curtailed where the parties to a labor dispute have by contract created private machinery for the settlement of differences of opinion between them; another aspect of this important general question will be presented in the Board's petition for certiorari in *C & C Plywood Corp.* (see n. 8, *supra*).

3. The decision below is erroneous. The statutory "obligation to bargain in good faith includes the duty of the employer to furnish to the union relevant data to enable the representative effectually to bargain for the workers." *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569, 571 (C.A. 5). And, of course, the employer's good-faith bargaining obligation "does not terminate with the signing of the collective bargaining contract. It continues through the life of the agreements so far as it is necessary to enable the parties to administer the contract and resolve grievances or disputes." *Ibid.* See, *e.g.*, *Conley*

*In addition to the cases cited in note 5, *supra*, see *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149; *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947 (C.A. 2); *National Labor Relations Board* v. *Otis Elevator Co.*, 208 F. 2d 176 (C.A. 2); *Taylor Forge & Pipe Works* v. *National Labor Relations Board*, 234 F. 2d 227 (C.A. 7) certiorari denied, 352 U.S. 942; *National Labor Relations Board* v. *Leland Gifford Co.*, 200 F. 2d 620, 624 (C.A. 1); *Twenty-sixth Annual Report, National Labor Relations Board* (G.P.O., 1962), pp. 112–114.

v. *Gibson*, 355 U.S. 41, 46; *J. I. Case Company* v. *National Labor Relations Board*, 253 F. 2d 149 (C.A. 7). The information sought here was necessary to enable the union to present and resolve a grievance matter. By withholding such information, the employer hindered the union in the performance of its duty, as collective bargaining representative, to process grievances. As the Third Circuit pointed out in *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 71 (C.A. 3), "[d]emands for information are usual precursors to the submission of complaints and grievances to grievance and arbitration machinery. This is only natural, for * * * unions would be forced to grope blindly through the very stages of the grievance procedure unless adequate information were preliminarily available."

It is no answer that questions relating to information sought in connection with a grievance proceeding are for the arbitrator to decide. Not every grievance is carried to arbitration. Arbitration is usually the last as well as the most costly step in the grievance procedure. Many grievances are disposed of at earlier stages, either because investigation by the union shows them to be without merit or because the union for some other valid reason decides not to press them. Unless the union can obtain information in connection with a grievance before proceeding to arbitration, it will be unable to make an intelligent decision whether and how to process the grievance.

Thus the decision below, if upheld, would not facilitate or encourage the use of grievance and arbitration procedures to settle labor disputes, but would have the

opposite effect. If unions may be forced by employers to carry a grievance to arbitration before the union has had an adequate opportunity to determine such matters as whether the grievance has any merit, what provisions of the contract are relevant to its disposition, and whether it could not better be disposed of by informal methods, one of two results, both undesirable, will follow: Either all grievances will be pressed to arbitration, and grievance procedures, consequently, will become far more formal, cumbersome, protracted, and expensive than heretofore; or the union will be forced, because of the cost involved, to abandon many grievances which adequate information might have shown to be meritorious.

Since the decision below thus is incompatible with effective grievance procedures, the court of appeals' result can derive no support from this Court's decisions under Section 301 of the Labor-Management Relations Act giving hospitable scope to agreements to arbitrate.[10] Such decisions (which in any event do not purport to limit the Board's remedial authority under the National Labor Relations Act)[11] express a policy of encouraging the utilization of contract procedures for the resolution of labor disputes; the practical effect of the decision below would be to thwart the efficient functioning of such procedures.

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[10] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

[11] See *Lodge 743, Machinists* v. *United Aircraft Corp.*, 337 F. 2d 5, 10–11 (C.A. 2), certiorari denied, 380 U.S. 908.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General.

ARNOLD ORDMAN,
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DOMINICK L. MANOLI,
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Assistant General Counsel,
National Labor Relations Board.

JANUARY 1966.

APPENDIX A

In the United States Court of Appeals
for the Seventh Circuit

September Term, 1965 September Session, 1965

No. 15045

ACME INDUSTRIAL CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board

October 6, 1965

Before DUFFY, CASTLE, and MAJOR, *Circuit Judges*

CASTLE, *Circuit Judge:*

This case is before the Court upon the petition of Acme Industrial Company to review and set aside, and upon the cross-petition of the National Labor Relations Board to enforce, an order of the Board issued against the Company. The Board's decision and order are reported at 150 NLRB No. 144.

The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by failing to comply with the

Union's[1] request for information regarding the removal of machinery from the Company's Chicago, Laflin Street, plant. The Board's order requires the Company to cease and desist from refusing to bargain with the Union by refusing to furnish it with information concerning the removal of equipment and machinery from the plant; or from in any like or related manner infringing on its employees' Section 7 rights. Affirmatively, the Company is required upon request, to furnish the Union information concerning the removal of equipment and machinery from its plant, and to post designated notices.

The Company and the Union were parties to a collective bargaining agreement which expired on June 30, 1962. In October 1962, the Company employees represented by the Union went out on a strike which terminated with execution of a new agreement in April 1963. Although the Company operates several plants, the new agreement applied solely to its Laflin Street plant in Chicago, Illinois. At the time of the strike, about 190 employees comprised the plant bargaining unit. Immediately after the Company resumed operations following the strike, a number of employes were laid off. Between April 1963 and the date of the unfair labor practice hearing in late August 1964, the number of employees on layoff status ranged between 30 and more than 75. During this period, the status of between 7 and 9 employees was changed from layoff to termination under provisions of the agreement that continuous layoff for given periods effected a loss of seniority.

The 1963 collective bargaining agreement included a no-strike clause, a grievance and arbitration clause embracing "a difference of opinion with respect to the meaning and application of the terms of this agreement", and subcontracting and work transfer clauses containing the following provisions:

---

[1] Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.

Article I

Section 3. It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company * * *

Article VI

Section 10. In the event the equipment of the plant or of any department, entirely or partially, is hereafter moved to another location of the Company, employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement covering production and maintenance employees at such location.

On or about January 8, 1964, the Union, upon discovering that machinery was being removed from the Laflin Street plant, began to seek information concerning this through inquiry by its stewards. The steward in each of the several instances involved asked why the machinery was being removed and where it was being moved. Company representatives answered that no violation of the contract was involved and refused to give the information. The Union submitted 11 grievances concerning removal of machinery and the subcontracting of work.

On April 3, 1964, the president of the Union wrote a letter to the Company requesting information concerning the approximate date when each piece of equipment was moved out of the plant; the place to which the equipment was moved and whether such place is a facility which is operated or controlled by the Company; the number of machines or equipment moved out of the plant; the reason or purpose for moving the equipment; and whether the equipment is

used for production elsewhere. The Company refused to furnish the information requested.

All of the 11 grievances were still pending at the time of the August 1964 hearing on the unfair labor practice charge. The Board found that the information requested was "necessary in order to enable the Union to evaluate intelligently the grievances filed and to determine whether such grievances were meritorious, and whether to press for arbitration". The Board reasoned that the denial of the information deprives the Union of an opportunity to know whether jobs and machinery had been moved out of the plant under circumstances entitling employees, especially those in layoff status, to follow the jobs or entitling the Union to grieve over improper subcontracting. The Board concluded that the Company was under a statutory duty to furnish the information for the reason that by virtue of the provisions of Section 8(a) (5) and (1) and 8(d) of the Act an employer is under a statutory duty to furnish his employees' bargaining representative information which is relevant to a grievance or to the administration or policing of the contract.

But, apart from provisions such as the subcontracting and work transfer clauses of the agreement here involved it is not apparent that the removal of machinery from an employer's plant would have relevance to a possible grievance or to contract administration or policing. The nature of the subject is such that it neither necessarily nor presumptively relates to wages, hours, or other terms or conditions of employment. Moreover, the agreement provided that differences with respect to the meaning or application of the provisions concerning the contracting out of work and work transfers are subject to final and binding compulsory arbitration. And the grievance procedures prerequisite to arbitration had been invoked and were pending. The factors bearing on a determination of the relevancy of the information requested are interrelated with a construction and application of the contract provisions. The latter is a matter exclusively reserved for the arbitrator. Under the

circumstances here presented Board intervention to make the determination of relevancy in the light of its independent interpretation of the meaning and application of the contract provisions contravenes the policy expressed in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, concerning the priority which should be accorded the grievance and arbitration procedures and machinery provided for in the contract. It was there pointed out (363 U.S. 581) that the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government and constitutes a part of the continuous collective bargaining process.

The arbitrator may require that he be furnished with information relevant to the resolution of the difference submitted. Under the rationale of *United Steelworkers, supra*, recourse to the Board under such circumstances as are here presented appears to constitute a refusal to participate in the continued collective bargaining process afforded by the grievance and arbitration procedures prescribed. In any event, enforcement of the Board's order in the posture of this case would in our judgment contravene the national policy embodied in Section 203(d) of the Labor-Management Relations Act (29 U.S.C.A. § 173) that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement". And, "[t]hat policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play". *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 566. Courts "have no business * * * determining whether there is particular language in the written instrument which will support the claim" (*ibid.*, 568). The declared statutory policy, and the judicial admonitions addressed to the courts, are equally applicable to the Board. Where the determination of the relevancy of information necessarily in-

volves factors interrelated with or dependent upon construction of the substantive provisions of the labor agreement, and those provisions are the bases of pending grievances already submitted under the grievance and arbitration procedures of the agreement, Board intervention in the guise of determining and enforcing the peripheral matter of the duty to furnish information requested contributes nothing to any objective of the Act and in our opinion is improper. The order clashes with the policy of effectual achievement of contractual arbitration.

The Board's order is set aside and its enforcement is denied.

ORDER SET ASIDE AND ENFORCEMENT DENIED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT

For the Seventh Circuit, Chicago, Illinois, 60604

WEDNESDAY, OCTOBER 6, 1965

Before

Hon. F. RYAN DUFFY, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. J. EARL MAJOR, *Circuit Judge*

No. 15045

ACME INDUSTRIAL CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board and the answer and request for enforcement of said order, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is hereby ordered by this Court that the order entered in this cause by the National Labor Relations Board on February 1, 1965, be, and the same is hereby set aside, and enforcement of said order is denied, in accordance with the opinion of this Court filed this day.

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX B

The relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

TITLE I. AMENDMENTS OF NATIONAL LABOR RELATIONS ACT

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SEC. 10. (a) The Board is empowered, as herinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

TITLE III. SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between

any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 878 57

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ACME INDUSTRIAL COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR ACME INDUSTRIAL COMPANY IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 876

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ACME INDUSTRIAL COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR ACME INDUSTRIAL COMPANY IN OPPOSITION.

OPINIONS BELOW.

The Board's decision and order (J.A. 26-33)[1] is reported at 150 NLRB No. 144. The Opinion of the Court of Appeals for the Seventh Circuit is reported at 351 F. 2d 258. No petition for rehearing was filed in the Court of Appeals.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

1. As in the Board's Petition, "J.A." refers to the Joint Appendix in the court below, copies of which were filed with the Petition.

QUESTIONS PRESENTED.

1. Whether it is a refusal to bargain collectively, in violation of Section 8(a)(5) of the National Labor Relations Act, for an employer to decline to furnish a union with information which is not presumptively relevant to wages, hours or other terms and conditions of employment and for which no proof of relevance has been shown.

2. Whether information which may be *related* to a collective bargaining agreement must, *ipso facto,* under the provisions of Section 8(a)(5), be given to the union requesting same.

STATUTE INVOLVED.

The Board's Petition for Certiorari omits the following significant portion of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151, *et seq.*; Sec. 173 (d)):

> "(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

STATEMENT.

The Board's statement of facts alleges that: "After a full evidentiary hearing, the Board found that the information sought by the Union was necessary . . ." (p. 5, Petition). To the contrary, however, the record shows that Respondent's attempts to elicit testimony concerning the irrelevancy of the requested information were hampered by continued objections from Counsel for the General Counsel (see J.A. 50-51), which objections the Trial Examiner finally upheld (J.A. 82-83):

"Trial Examiner: I would now rule that it is not an issue.

"Mr. Kovar: May I be heard before you rule, Mr. Trial Examiner?

"Trial Examiner: Yes, sir.

"Mr. Kovar: Under Article 6, Section 10 of the collective bargaining agreement, the parties have negotiated a provision which requires that where equipment is moved to another location of the company an employee who is then working in the plant who is subject to reduction in classification or is subject to layoff as a result thereof has certain rights.

"Trial Examiner: Yes, that is right.

"Mr. Kovar: If the union knows that there are no such employees as we have attempted to indicate is the fact through the testimony we have sought to introduce here, then it seems to me clear on the face that the additional information as to where equipment is moving is completely irrelevant to this contract, to the administration, to its enforcement.

"Now, unless I can get into the record clear testimony the fact that the union knows very well that no employee has been laid off as a result of removal of equipment and knows very well that no employee has been reduced in classification as a result of this, I have an open question at which point the General Counsel may argue, 'Well, we don't know whether anyone has been laid off or not, and therefore, it might be, this information might be relevant so why not give it.'

"So facing that kind of argument, this is relevant.

"Trial Examiner: I will accept that kind of argument to the pleadings in this case. So I still consider this question irrelevant as to what is contained within the issues here which I construe is much more narrow than apparently the parties.

"This is a very narrow complaint. In effect you are anticipating allegations which have not been made. In other words, asserting an affirmative defense where there is no attack, where no attack has been placed by the General Counsel. I don't think that is necessary. The General Counsel has not made the direct allegation

and submitted evidence in support thereof and there is no necessity for you to rebut it.

• • • • •

"Mr. Kovar: Mr. Trial Examiner, at this time I will renew the motion which was entered by stipulation at the opening of the hearing and in oral fashion refer that motion and the reasons thereto set forth: I do not believe that the complaint or the evidence supporting it alleges, much less shows a violation of the National Labor Relations Act.

• • • • •

"[Trial Examiner.] . . . If I reach a decision and say that the Board should accept jurisdiction, then I will reach and only then the question of the relevancy of the information requested. Therefore, I am reserving decision on your motion, naturally."

The Board's statement does not note the fact that the Trial Examiner recommended that the complaint be dismissed in its entirety, stating (J.A. 24-25):

"I would not hold that the Respondent has committed an unfair labor practice by withholding information where the dispute has been contemplated by the parties in making their contract and binding arbitration has been established to resolve that dispute. We are approaching a point where an employer may well wonder if he has anything to gain by engaging in collective bargaining if any disaffection with the operation of the contract on the part of the contracting union may be taken to review by the Board under Section 8(a)(5)."

ARGUMENT.

The Petition presents no question warranting further review.

1. There is no conflict between the decisions of the courts below. No court has held, as the Board here contends, that an employer must give information which is neither presumptively, nor proven, relevant to the union's bargaining and representative function.

The *Timken Roller Bearing* case (325 F. 2d 746 (6th Cir. 1963), *cert. denied,* 376 U.S. 971 (1964)), involved wage data, which was held to be presumptively relevant to the bargaining function of the union. Its relevance stood clear without regard to the existence or special language of the labor agreement.

The *Curtiss-Wright* case (347 F. 2d 61 (3rd Cir. 1965)) also involved presumptively relevant information. The relevance of the information did not depend upon the provisions of a labor agreement.

In the only courts of appeals cases prior to the one here involved, where the Board has attempted to initiate itself into the administration and enforcement procedures of a labor agreement, the courts have uniformly denied the Board's attempts. *Sinclair Refining Co.* v. *NLRB,* 306 F. 2d 569 (5th Cir. 1962); *Square D Company* v. *NLRB,* 332 F. 2d 360 (9th Cir. 1964). In both cases the courts emphatically rejected the Board's attempted entry into labor contract administration. In both cases, the courts held that where the relevance of the requested information depended upon the language of the labor agreement, a contract issue was involved, not a statutory issue; contractual remedies should be pursued, not statutory remedies.

The Board, in a footnote in its Petition (p. 8, Petition), takes the position that this case does not involve labor agreement interpretation. But this position ignores the clear and unambiguous holding of the lower court (pp. 17-18, Petition):

> ". . . Where the determination of the relevancy of information necessarily involves factors interrelated with or dependent upon construction of the substantive provisions of the labor agreement, and those provisions are the bases of pending grievances already submitted under the grievance and arbitration procedures of the agreement, Board intervention in the guise of determining and enforcing the peripheral matter of the duty to furnish information requested contributes nothing to any objective of the Act and in our opinion is improper. The order clashes with the policy of effectual achievement of contractual arbitration.
>
> "The Board's order is set aside and its enforcement is denied."

We must assume that what the Board is contending is that contract interpretation affects the relevance of information sought only when it relates to the arbitrability of the alleged grievance. But this contention would destroy the significance of the requirement of relevance, because as this Court has held (*United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960)):

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions . . ."

If any colorable claim is arbitrable, (even ". . . frivolous claims may have therapeutic value . . ." (*United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960)) then, under the Board's contention, any information related to any colorable claim must be given upon request.

No court of appeals has ever so held.

2. While the importance of the questions here involved cannot be gainsaid, we respectfully submit that their repetition below is due to the Board's failure to follow the clear mandate expressed by this Court in *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 153-154 (1956):

> "[. . .] The inquiry must always be whether or not under the circumstances of the particular case the statutory objective to bargain in good faith has been met."

The Board, we believe, is attempting to establish another *per se* rule of bargaining in good faith. And in doing so, the Board has not only ignored the clear mandate of this Court, but has also ignored the uniform lower court rejection of its attempt to establish a rule that any information which may be related to a labor contract provision must be submitted upon union request.

3. The Board attempts to invoke this Court's consideration by challenging, in its Petition (pp. 9-11, Petition), the propriety of the lower court's decision. Thus, the Board contends that the deprivation of information concerning removed equipment hindered the union in the performance of its duties (p. 10, Petition).

How? How is a union hindered by not knowing about the removal of equipment which has never been used? Unused for years? Damaged beyond repair? Obsolete? Replaced by new equipment? Saying it does not make it so, but that is *all* the Board has done.

The Board further argues that the decision below is incompatible with an effective grievance procedure (pp. 10-11, Petition). The fact that this case involves matters occurring some two years ago should rather conclusively reveal that the Board's intervention in a grievance case is something less than efficacious. In *Sinclair Refining Co.* v. *NLRB*, 306 F. 2d 569, 579 (5th Cir. 1962), the court decisively impaled this argument upon its own point, stating:

"But if the Union may, as it has done here, call upon an outside agency as the weapon for discovery of information which, on one of the alternative constructions of the contract, will be completely superfluous, the whole proceeding is necessarily disrupted. The arbiters cannot continue. The whole controversy then shifts from the plant to the nearest Board hearing room, and thereafter to the nation's capital, and then on to the seat of any one of the eleven Courts of Appeals having geographical jurisdiction over the employer. Whatever else that is, it is not giving full play to the means established by the parties. More than lost time, it introduces or magnifies advocative hostility. For now a new adversary has entered the lists—the General Counsel who, from the nature of the complaint, aligns himself with one of the adversaries—the Union—but who as a sort of protector of the general public interest must advance his advocacy, pro and con, not in the manner best calculated to bring an end to the dispute, but in a manner thought, from that lofty vantage, to be best for the general good. Even worse, that diversion ends in a decision which, if it determines the substantive issue adversely to the Employer as does this one leaves the Employer facing an additional adversary —the Board. This makes it necessary for the Employer to resist that determination in order to get the matter back where it started—in the laps of the arbitrators. To do that the Employer must come to court. But the courthouse, says the Supreme Court, is not the place to work out industrial disputes when arbitration has been prescribed and is available."

With all due respect, we submit that it was the decision of the Labor Board that was in error, not that of the Court of Appeals for the Seventh Circuit.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

and

INTERNATIONAL UNION, UAW, AFL-CIO, AMALGAMATED LOCAL UNION NO. 310, *Intervenor,*

v.

ACME INDUSTRIAL COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR INTERVENOR, UAW, AFL-CIO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 52

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

and

INTERNATIONAL UNION, UAW, AFL-CIO, AMALGAMATED LOCAL UNION NO. 310, *Intervenor*,

v.

ACME INDUSTRIAL COMPANY, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR INTERVENOR, UAW, AFL-CIO

This case arises from a Decision and Order of the National Labor Relations Board requiring the Acme Industrial Company to furnish certain information to the United Automobile Workers (intervenor herein), necessary for its informed disposition and presentation of employee contract-violation claims pending in the grievance-arbitration process. Upon the Company's petition for review, the Seventh Circuit Court of Appeals set the Board's Order aside and refused to enforce it. The petition of the National Labor Relations Board for a writ of certiorari was granted on February 21, 1966. 383 U.S. 905. Meanwhile, this Court's decision in *International Union, UAW* v. *Scofield*, 382 U.S. 205, had established the

full right of participation in judicial review proceedings by a union which is the prevailing charging party before the Labor Board. The UAW thereupon moved for intervention in this proceeding, which was granted on May 2, 1966. 384 U.S. 925. Intervenor regards the present case as one of great importance in the continuing elaboration of the national policy of collective bargaining as a process of adjustment of differences between labor and management through informed and enlightened negotiation.

Statement

The brief for the National Labor Relations Board succinctly sets forth the pertinent facts of record upon which the Board found the Company to have violated Section 8(a)(5) of the Act in its refusal to disclose to the Union facts pertinent to pending employee grievances of contract violation. We will not burden the Court with a repetition of those detailed facts. Instead, we review herein some practical necessities which in this and related cases have moved the Union to seek full employer disclosure in the face of a variety of excuses for concealment of readily available data on issues raised by employee grievances.

Collective bargaining agreements in effect in major national industries are detailed and complex documents, specifiying a variety of employee rights in such areas as wages, hours, seniority, retirement, fringe benefits, discipline, and related matters. Not surprisingly, a great number of individual employee complaints of violation are filed under every contract at the first step of the typical multi-phase grievance procedure. Ordinarily, as in this case, (see R. 98), the three-step grievance procedure does not necessarily involve the union at the early stages, while the succeeding steps increasingly require the union's active participation in the process of grievance negotiation and

adjustment.[1] Typically too, when the grievance steps have been exhausted without successful settlement, the union alone, as the representative of the employees, is authorized to press the matter on to compulsory arbitration. Of course, since arbitration is expensive and time consuming, the overwhelming proportion of grievances are adjusted by the parties without the necessity of recourse to arbitration, and very often the union will decline to pursue to arbitration even grievances which it believes to be meritorious where it judges the chances of success to be too slight.

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[1] Article IV of the UAW-Acme agreement of April 23, 1963, provides (R. 98):

"*Section 1.* A grievance is a difference of opinion with respect to the meaning and application of the terms of this Agreement.

Section 2. Grievances or complaints shall be adjusted as follows:

STEP 1: Any attempt to adjust a grievance or complaint will first be made between the employee, his steward, and his foreman. If the foreman should call or bring in any other Company representative into this discussion, the steward shall have the right to call or bring in the area committeeman. (The steward may phone the area committeeman or go to see him to discuss the grievance under such circumstances).

STEP 2: If the matter is not satisfactorily settled, the steward or the area committeeman shall reduce the grievance or complaint to writing within five (5) working days, specifying the nature of the grievance or complaint, shall identify the employee(s) involved, and in the case of a grievance, the contract provision(s) involved. The foreman shall within three (3) working days thereafter set forth his written answer and the matter shall be discussed at the next semi-monthly meeting between the shop committee and representatives of the Industrial Relations Department. Such meetings will be held at 2:00 P.M. on the day in question, or such other time as is mutually agreed to, but will be held only if there are grievances then pending; however, special meetings may be called by either party if a matter of immediate emergency is involved and such meeting must be held within three (3) working days of such call.

STEP 3: If the matter is not satisfactorily settled, the Union may appeal within five (5) working days, and a meeting of the shop committee and representatives of the Industrial Relations Department shall be scheduled at which the Union's International Representative(s) or other representatives shall be present. The Company shall give the Union a written final answer within five (5) workings days of such meeting.

Section 3. If a grievance is not satisfactorily adjusted under the above procedure, the Union may appeal the grievance to arbitration within twenty (20) days of receipt of the Third Step answer . . ."

Representative of the UAW experience are the figures under the General Motors contracts, which have given rise to more than one million written grievances in the period since 1955. *During this period the percentage of grievances not resolved by voluntary grievance settlement and thus required to be disposed of by arbitration, has been less than one-tenth of 1%.* The last available statistics (see Appendix, *infra*, p. 25) show that during 1963, of the 137,966 written grievances, 64.9% were settled at step one, 25% at step two, and 10% at step three of the grievance procedure, leaving only 84 grievances (.06%) which were resolved by arbitration. During 1964, of 158,051 written grievances, 67.8% were settled at the initial step, 25% were settled at the second step and 7.2% at the third step of grievance, leaving only 45 cases (.028%) resolved by arbitration. ("Settled" as used here refers to grievances which are granted, compromised or dropped.)

The burdensome and expensive nature of arbitration—which can effectively be resorted to in only a small proportion of cases—necessitates the union's maximum access to relevant information bearing upon the merits of contract grievances. If the union has access to the facts and is accordingly on approximate parity with the employer in its ability to gauge the merits of grievances, it is enabled to choose effectively between those it will process on to higher levels of grievance-negotiation, those it will settle, and those it will abandon. It is also in a position to be effective in the presentation of meritorious grievances to the employer for voluntary adjustment, and it is enabled intelligently to choose, from among those remaining unsettled, the grievances which it will press on to compulsory arbitration.

Conversely, without the pertinent grievance facts, frequently known only to the employer, the union must often accept on faith the subjective assertion of the individual grievant, is at an obvious disadvantage in arguing to the

employer the merits of the grievance, and may ultimately be reduced to choosing blindly between the grievant's allegation and the employer's *ipse dixit* denial in determining whether to press on to arbitration. Such a process of "blindman's buff" was well described 20 years ago in a Twentieth Century Fund study (Williamson and Harris, *Trends In Collective Bargaining*, p. 234), which noted that the bargaining parties:

> ". . . must be prepared to disclose all pertinent information at their disposal. The United States community cannot permit collective bargaining to be merely a game of blindman's buff rather than an adult effort to implement illumination. The day is long past when collective bargaining can be adequately carried on in the atmosphere of a David Harum horse trade, or the chaffering of an Oriental bazaar."

These general considerations are specifically illustrated in the present case. The Acme Company carries on production operations at a number of plants, including the Chicago facility from which this dispute arises. Prior to the negotiation of the collective bargaining agreement of April 23, 1963 governing the Chicago plant, earlier Union-Company contracts had contained no specific provisions concerning Company transfer of equipment (see R. 87 and 127) or limiting its power of subcontracting (R. 91). However, during the 1963 negotiations the Company notified the Union "that it proposed to transfer equipment to other locations and to third parties and that it was willing to negotiate with the Union" about such transfers and their effect upon the employees (R. 91). Such negotiations took place, and resulted in two contract provisions obtained by the Union to safeguard against loss of job opportunities (R. 91). Article I, Section 3 of the 1963 contract (R. 96) stipulates against subcontracting of work "normally per-

formed" in the bargaining unit which "will cause" layoff or non-recall of workers; and Article VI, Section 10 (R. 102) assures that in the event of any equipment removals "to another location of the Company", affected employees may transfer with the equipment "with full rights and seniority."

A few months after the negotiation of the 1963 agreement, the Union learned that the Company had begun moving machinery out of the Chicago plant (R. 63-64). Thereupon, Union representative Rich approached the foremen of the departments affected to ask the cause and destination of the equipment removals (R. 63-72). In each case, after checking with the Company personnel director, the foreman stated (R. 65) that the Company "felt they were not in violation of the contract and therefore they did not feel compelled to give the union any definite answer as to why the machine was moved or where . . .". Although Rich protested that "the reason we need this information was to be able to process this grievance" (R. 65), the answer always came back that "they were not violating the contract and therefore they felt they were not compelled to give the union this information" (R. 66, 71, 72). When the Union representative pleaded with a foreman that since *"the company was contending that they were not in violation of the contract why couldn't he divulge this information to me,"* the answer "was still the same, because they felt they were not in violation of the contract" (R. 72).

Faced with these repeated adamant refusals of disclosure, it became necessary to initiate contract-violation grievance proceedings without possession of the material facts, and a number of individual employee grievances were accordingly filed in January, February, and March of 1964 (R. 109-123). Subsequently, the Company declined a formal written request by the Union for the dates, destinations, numbers, and cause of the equipment removals and re-

fused to say whether the equipment was to be "used for production elsewhere" (R. 124-125).[2]

Of course, the Company's refusal to divulge the cause or destination of the equipment removals left the Union wholly perplexed. Only a few months earlier, the Company had volunteered its intention of moving equipment to its other plants, and had granted the workers contract safeguards with respect to sub-contracting and equipment relocation (R. 91). But now the Company was flatly refusing to explain anything about the *actual* removal of equipment, claiming no confidentiality of any kind but in effect challenging the Union to invoke and exhaust the three-step grievance procedure without access to the pertinent facts and to resort to arbitration where it might ultimately appear that the equipment has been removed for innocuous sale or destruction rather than for subcontracing or relocation.

The bargaining union's need for the material facts bearing upon claims of contract violation is further illuminated in *Fafnir Bearing Company*, a UAW case recently before this Court on a procedural point (No. 53 October Term, 1965), since decided by the Court of Appeals for the Second Circuit on June 17, 1966 (35 U.S.L. Week 2009). The case arose from pending grievances of mis-timing of piece-rated jobs. The employer had refused the Union access to the production area to make "live" time studies on the jobs in issue. In declining to permit the Union to make its own time studies, the employer had rested on the view that the Fafnir

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[2] It is noteworthy that the Company's refusal to disclose is out of keeping with *the informational needs of the Union recognized in the very agreement from which this dispute arises.* The concluding section of Article IV of the contract (Gen. Counsel Exhibit 3) states that in grievances appealed to the Shop Committee in which the International Union representatives or Business Agent "must actually observe the operation about which the dispute has arisen during working hours, in order to understand the case, he will be permitted to enter the plant to make such observations . . ."

Company time studies, upon which the disputed rates had been set, were all that the Union needed or could have.

The Board proceedings in *Fafnir* highlight the dilemma for the union in its presentation of the grievances for voluntary settlement and its selection of those worthy for arbitration, if it cannot have access to the facts necessary to make an informed judgment upon the merits of pending claims of violation. The UAW's chief time study expert, Mr. Kermit Mead, emphasized in his testimony the Union's experience that where it can make its own time studies it frequently finds the individual grievances to be without merit: "In many instances I have recommended to the union that the price arrived at on the job by the company is the correct price in my opinion, and they should not go to arbitration, and my word is final as far as the International Union is concerned" (J.A. 36a). Indeed, a half of more than 2400 piece-rate grievances time studied by the Union since 1962 were found unjustified and necessary of abandonment.

In ruling against Fafnir Company's refusal to permit union time studies, the Board emphasized the salutary effect upon voluntary settlement of grievances through collective bargaining when the material facts are available to both parties (146 NLRB 1582, 1587):

> "We believe that permitting a union to have access to relevant information where no hardship or other reason would dictate a denial of such access will tend to eliminate unnecessary disputes and diminish the number of grievances which are taken to arbitration. Thus, the Union herein, because of lack of relevant information, if it wants to be sure that the employee interests are adequately represented must press these grievances to arbitration and incur unnecessary costs of processing grievances that may turn out to be without

substantial merit. It is reasonable to believe, as Mead testified, that an independent time study of the disputed operations could very well lead to the Union's dropping the grievances."

In like vein, the Second Circuit's *Fafnir* opinion enforcing the Board's order emphasizes that disclosure of information promotes voluntary adjustment of grievances between the Union and the employer without the necessity of arbitration:

> "It is also urged that since the arbitrator was authorized to conduct his own [time] studies, what the Union sought here was merely duplication of effort; thus, the Company's restrictive view of Section 8(a)(5) should prevail. But, this argument misses the mark. The reason the Union desired to make 'live' tests was not to usurp the function of the arbitrator and thereby interfere with standard grievance procedures; it was needed, instead, to determine whether to take the grievances to arbitration in the first place.* By preventing the Union from conducting these studies, the Company was, in essence, requiring it to play a game of blind man's buff. Only by guess-work could the Union determine which piece rates to protest and which to accept. Of course, the Union always had the option of demanding that *all* grievances on proposed piece work prices be reviewed by the arbitrator; but that alternative obviously would be impractical, expensive

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* "The Union's brief states (emphasis omitted):

> "'More than 2400 disputes arising in the grievance process were time studied by the UAW [Time Study] Department between 1962 and 1965; and of these grievances the Union found 50 percent unjustified and necessary of abandonment, while 80 percent of the remainder were adjusted with the employers without the necessity of invoking arbitration.'"

and indeed strife-breeding, considering that there were over 10,000 new proposed rates each year. Thus, if the Company-Union grievance machinery was to work smoothly, it was essential that the Union obtain the information necessary for a considered judgment."

The ruling of the Court below starkly contrasts with the practical approach espoused in the Second Circuit's *Fafnir* opinion. Far from recognizing that voluntary settlement of labor-management grievance disputes is facilitated when the union is given access to the material facts, the Seventh Circuit's decision states (R. 133) that Board "intervention" to require employer disclosure prior to arbitration "in the guise of determining and enforcing the peripheral matter of the duty to furnish information requested contributes nothing to any objective of the Act . . . and clashes with the policy of effectual achievement of contractual arbitration."

At best, this is a mistaken elevation of compulsory arbitration to an order of virtue exceeding voluntary dispute adjustment. Such an inversion would be unwarranted even in analogous areas of litigation settlement, but it is particularly out of place in an area where Congress has legislated a comprehensive federal code specifically to foster resolution of differences through voluntary collective bargaining. In any event, as we demonstrate in the Argument, the Court below wholly confuses the procedural discovery of facts bearing upon grievance-arbitration proceedings with the resolution of the merits of the underlying grievances. The present case provides appropriate occasion for disentangling procedure from substance and upholding a fully informed grievance-settlement process consonant with the chief purposes and mandate of the National Labor Relations Act.

Summary of Argument

The Union's statutory right to information bearing on pending grievances is not preempted by the availability of arbitration to resolve the merits of those grievances.

In the "continuing collective bargaining process" of grievance adjustment it is established that the bargaining union has a right under Section 8(a)(5) of the Act to the material facts bearing upon pending grievances. In the present case the Company violated its clear statutory duty to disclose the material facts. In a very similar situation this Court has upheld a union's right under the statute to full disclosure of pertinent data. *NLRB* v. *F. W. Woolworth Co.*, 352 U.S. 938.

The suggestion of the Court below that the Board's authority to require employer disclosure is preempted by the availability of arbitration to resolve the merits of the pending grievances misses the point: since discovery is needed for the Union's effective handling of the pending grievances, the existence of the grievance-arbitration machinery is not a *substitute for* but the very *predicate of* the discovery right vindicated by the Board's order. Moreover, Section 10(a) of the Act specifically provides that the Board's remedial power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ."

Equally without merit is the lower Court's suggestion that the Board's power is ousted because "the determination of the relevancy of information involves factors interrelated with or dependent upon the substantive provisions of the labor agreement" which is enforceable by compulsory arbitration. No such contract construction by the Board was here required, because the employer has never denied the grievability of the subject upon which the

Union requested the material facts. Such cases as *Square D Co.* v. *NLRB*, 332 F. 2d 360 (C.A. 9) and *Sinclair Refining Co.* v. *NLRB*, 306 F. 2d 569 (C.A. 5) are not in point because there the employers denied *grievability* and thus raised a justiciability issue needful of disposition before granting discovery on the merits. We believe that the Board's determination in those cases to resolve the underlying contract construction issue posed by the justiciability challenge—rather than await an arbitrator's resolution—should not have been overruled by the Circuit Courts. But in any event those rulings have no impact in this case, where the employer simply denies liability on the merits of the pending grievances rather than challenging grievability itself.

In sum, an arbitral validation of the Company's plea that it has not violated the contract could in no way impair the Union's present right under the Act to the material facts on the merits of the pending grievances. In labor relations no less than in civil litigation, discovery of facts is needed before the resolution of the underlying claim, and the Board's order that the Company disclose the material facts bearing on pending employee grievances should accordingly be reinstated and enforced.

ARGUMENT

The Union's Statutory Right to Information Bearing on Pending Grievances Is Not Preempted by the Availability of Arbitration to Resolve the Merits of Those Grievances.

"The grievance procedure is a part of the continuing collective bargaining process." *Steelworkers* v. *Warrior and Gulf Co.*, 363 U.S. 574, 581. It is an accepted corollary principle established by numerous enforced Labor Board decisions, that in the "continuing collective bargaining process" Section 8(a)(5) of the National Labor Rela-

tions Act assures the bargaining union the right to information relevant to pending grievances.[8] As Professor Archibald Cox has summarized the prevailing authorities (*The Duty To Bargain In Good Faith*, 71 Harv. L. Rev. 1401, 1427):

> "It is now settled that it is an unfair labor practice for an employer to refuse to furnish the bargaining representative with information concerning individual earnings, job rates and classifications, merit increases, pension data, time-study data, incentive earnings, piece rates, and the operation of the incentive system. Although many of the cases use the language of bad faith, proof of the denial of the information is sufficient standing alone to make out the violation of section 8(a)(5)."

No less clear than the existence of the statutory right to discovery of grievance information is the standard of discovery itself: if the facts sought by the union are relevant to a material position taken by either party, the union is entitled to have them. See *Labor Board* v. *Truitt Mfg. Co.*, 351 U.S. 149; *NLRB* v. *F. W. Woolworth Co.*, 352 U.S. 938; *Curtiss-Wright Corp.* v. *NLRB*, 347 F. 2d 61. In the present case the Board properly applied that standard.

A. *The Company Violated Its Clear Statutory Duty To Disclose The Material Facts Bearing On Pending Contract Grievances.*

The governing collective bargaining contract with the Company (Articles I and VI) provides specific safeguards against loss of jobs by sub-contracting or by the removal

[8] See, e.g. *NLRB* v. *F. W. Woolworth Co.*, 352 U.S. 938; *J. I. Case Company* v. *NLRB*, 253 F. 2d 149 (C.A. 7); *NLRB* v. *Item Co.*, 220 F. 2d 956; (C.A. 5), cert. den. 350 U.S. 836; *NLRB* v. *Whittin Machine Works*, 217

of equipment to another plant of the same employer. After the Company embarked on a program of machinery removal, it refused to explain the cause or destination thereof —on the *ipse dixit* that no contract violation has occurred. Employee grievances were thereupon filed alleging violation of these contract provisions. Thereafter, while the grievances were pending at the second level of the three-step grievance procedure, the Union again asked the Company for disclosure of the material facts—the cause and destination of the equipment removal, and whether it was to be used for production elsewhere. Following the employer's renewed refusal to provide the information requested, the Union charged the Company with refusal to bargain and the Board ruled (R. 26) that the Company violated Section 8(a)(5) in its refusal to disclose information patently relevant to pending contract grievances.

In a similar situation this Court has upheld a union's right under Section 8(a)(5) to full disclosure of relevant facts. In *NLRB* v. *F. W. Woolworth Co.*, 352 U.S. 938, the Court of Appeals had refused to enforce a Board order requiring the employer to give the union individual employee earnings data, where the employer contended that the wage rates to be paid had been made a matter of sole company prerogative under the contract. No actual grievances had yet been filed with respect to the wages paid. In petitioning this Court for a review of the Circuit Court's decision that the relevance of the data had not been established, the Government noted (Pet., p. 10) that the information the Union sought "would provide a means of ascer-

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F. 2d 593 (C.A. 4), cert. den. 349 U.S. 905; *Curtiss-Wright Corp.* v. *NLRB*, 347 F. 2d 61 (C.A. 3); *Fafnir Bearing Co.* v. *NLRB*, 35 U.S. L. Week 2009 (C.A. 2); *Timken Roller Bearing Co.* v. *NLRB*, 325 F. 2d 746 (C.A. 6), cert. den. 376 U.S. 971; *IWA* v. *NLRB*, 105 App. D.C. 37, 263 F. 2d 483; *Boston Herald-Traveler Corp.* v. *NLRB*, 223 F. 2d 58 (C.A. 1).

taining whether union members were receiving minimum rates as required by the contract . . . [and would reveal] whether respondent's contractual authority to grant unilateral wage increases had resulted in unfair or inequitable wage distinctions . . ." The Government went on to emphasize (at p. 11) that "It may be suggested that the court of appeals . . . found the Union's request for the information defective for failure to specify a grievance . . . *The defect in this reasoning, however, is that effective administration of an agreement requires acquisition and correlation of the data which will enable the parties to make intelligent determinations as to whether there is any occasion for grievance*" (emphasis supplied). This Court summarily reversed the Circuit Court's ruling by the following per curiam order:

> "The petition for writ of certiorari is granted and the judgment of the Court of Appeals is reversed. The Board acted within its allowable discretion in finding that under the circumstances of this case failure to furnish the wage information constituted an unfair labor practice. *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149; cf. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474."

In view of the long line of authorities, including this Court's *Woolworth* decision, the Board's order in the present case merited strict enforcement. Instead, the lower Court has refused to enforce the Board's order in an opinion obscure in its rationale but sweeping in its effect. For the Court below does not question the pertinence of the grievance information sought by the Union; it simply holds that where compulsory arbitration of grievances is available on issues of contract construction, the Board is preempted from enforcing the Union's statutory right to grievance-

related information if "the determination of the relevancy of information necessarily involves factors interrelated with or dependent upon construction of the substantive provisions of the labor agreement . . ." (R. 133). But if the Court below were correct in its view that enforcing employer disclosure of material facts required the Board to impinge upon "factors interrelated with" contract construction, the Court's reasoning would apply equally in *every* arbitrable case where the Board enforces a union's statutory right to information relevant to a pending contract grievance. Accordingly, while purporting to recognize the statutory right to grievance information, the lower Court has actually created an "exception" virtually coextensive with and thus expunging the disclosure right itself.

A complete answer to the Circuit Court's "arbitration preemption" theory is Section 10(a) of the National Labor Relations Act (29 USC §160(a)). It provides that the Labor Board's remedial power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ." That power-preservation clause is particularly apposite here, because arbitration to resolve the merits of the pending employee grievances *can in no way provide* the Union with the information it needs for the very purpose of effectively pressing those grievances in negotiations prior to, and if necessary through to, arbitration. Since discovery is sought and granted as a statutory right so that the union may most effectively present meritorious complaints in grievance and arbitration proceedings, the existence of the grievance-arbitration machinery is not a *substitute for* but rather the *predicate of* the discovery the Board granted and the Circuit Court has denied.

Furthermore, as we show in Point B, the Circuit Court is simply in error in suggesting that the Board was precluded

from acting because it had to construe the contract before ordering disclosure of facts relevant to pending grievances. While such power to construe is certainly within the Board's authority when necessary for enforcement of statutory rights (see *infra*, p. 20, n. 5), no contract construction was here required of the Board.[4]

B. *No Board Construction of the Contract Was Required Here, Because the Employer Did Not Deny the Grievability of the Complaints Upon Which the Union Sought Material Facts.*

The principal judicial authorities relied upon by the Company are *Square D Co.* v. *NLRB*, 332 F. 2d 360 (C.A. 9) and *Sinclair Refining Co.* v. *NLRB*, 306 F. 2d 569 (C.A. 5). In those rulings the lower courts refused to enforce Labor Board 8(a)(5) orders to furnish relevant grievance information, holding that the employers' challenges to the justiciability of the grievances presented should have been left by the Board to initial resolution by contract arbitration.

In *Square D*, contract grievances had been filed with respect to certain employees' earnings under an employer incentive wage plan. The Company argued before the Labor Board, upon a challenge of its refusal to furnish

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[4] Apart from its "contract construction" thesis, the Circuit Court's observation (R. 132-133) that "the arbitrator may require that he be furnished with information relevant to the resolution of the difference submitted," may constitute a suggestion that the grievance information sought by the Union is somehow available under the contract itself. But, as the Labor Board noted (R. 29), there is no clause in the contract dealing with "furnishing of information necessary and relevant to the processing of grievances . . .". Indeed, in its briefs to the Circuit Court the Company never suggested that the contract itself provides a right to grievance-related information. Absent a contractually-stipulated disclosure right "clearly indicating that demands for information are to be made through the grievance and arbitration machinery, the existence of such machinery is no defense to an employer who has refused to supply relevant data upon a union request." *Curtiss-Wright Corp.* v. *NLRB*, 347 F. 2d 61, 71.

information pertinent to those grievances, that the contract affirmatively left to its sole judgment and prerogative the operation of the wage incentive plan, and that, accordingly, rates set thereunder could not properly be the subject of grievances under the contract grievance procedure. The Court of Appeals refused to enforce the Board's disclosure order on the ground that the contract construction issue raised by the employer's challenge to grievability should first have been resolved by arbitration. The Court noted (at p. 365) that the employer did not dispute "the proposition of law that the Union is entitled to data relevant to a grievance, irrespective of the merits of that grievance," but was contending only that the information was being sought upon a nongrievable matter. The Court (at pp. 365-66) ruled that in view of the employer demurrer to grievability, "the existence of an unfair labor practice here is *dependent* upon the resolution of a preliminary dispute involving *only* the interpretation of the contract. . . . We conclude that the question whether the Union by contract had waived its right to grieve respecting the group incentive plan should have been submitted to arbitration."

Sinclair Refining presented a similar justiciability challenge. There the employer claimed that the area in which the pending grievances had been filed—individual employee demotions for lack of work—had been left by the contract entirely to the employer's judgment and prerogative, and, accordingly, "there was no subject matter for grievance determination." As in *Square D*, the Circuit Court ruled that the employer's demurrer to the grievance upon which information was sought should first have been decided by the arbitrator, and refused to enforce the Board's order to disclose. In so doing, the Court emphasized (306 F. 2d at pp. 572-73) that the employer declined to furnish the data sought because:

"... this announced demotion was solely for management's decision. Since, under its interpretation of the contract, the Union had no right to question management's judgment that there was a *lack of work*, there was no subject matter for grievance determination and therefore the data sought ... was wholly immaterial ... Before the Trial Examiner the Employer vigorously renewed its basic contention that the data was not relevant or pertinent since the subject matter was not for grievance determination."

Similarly, the Labor Board's own deference to an arbitral resolution of the contract issue in *Hercules Motor Corp.*, 136 NLRB 1648, arose from a demurrer to the contract grievance upon which the union was seeking relevant data. There the employer took the position before the Board that a pending grievance concerning an hourly pay rate was nonjusticiable because the contract provided no right to question the employer's judgment as to the applicable rate. In withholding its action pending an arbitral decision, the Labor Board emphasized that the union was seeking information on a matter which the employer maintained "could not be the subject of a grievance under the contract" and that the information sought by the union "could have no bearing upon" the resolution of the contract interpretation issue (136 NLRB at p. 1652).

Hercules clearly presented the necessity for an initial interpretation of the contract to resolve a controlling jurisdictional challenge to grievability. So, too, *Square D* and *Sinclair Refining* involved jurisdictional challenges grounded on allegations that the matters upon which information was sought could not properly be the subject of grievances under the contract—thereby requiring an initial contract interpretation upon the grievability question. We be-

lieve that the Board's determination in those cases to resolve the underlying contract issue rather than to defer to arbitration should not have been overruled by the Circuit Courts.[5] In any event, in the present case there is no challenge to the legitimacy of the pending grievances but only a denial that the alleged contract violations have been committed.

That difference is critical. Where discovery of facts bearing on the merits of an asserted violation of contract is

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[5] The Circuit Courts' incursions in *Square D* and *Sinclair Refining* upon the Board's proper exercise of its statutory authority seem clearly erroneous. If the Labor Board has power to construe a contract when necessary to resolution of an NLRA issue, its so doing could hardly be deemed abuse of discretion merely because an arbitrator might resolve the contract point differently. Thus, in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272, this Court noted that if in the pursuance of its statutory functions the Board should "disagree with the arbiter . . . the Board's ruling would, of course, take precedence. . . .".

Nor can it be doubted that the Board *has* power to construe a contract, where necessary to the resolution of an NLRA question. Section 10(a) of the Act specifically assures that the Board's power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .". Adjudicatory necessity for resolving issues of "foreign law" is commonplace in the law of conflicts; and as long ago as *Marbury* v. *Madison*, 5 U.S. 137, this Court recognized that resolution of a case or controversy may require intrusion upon an adjacent jurisdiction. To suggest that the Labor Board in its adjudicatory process is precluded from resolving a statutory issue properly before it merely because there is a preliminary necessity for construing an arbitrable contract, would arbitrarily deny this federal agency the power to do the job Congress has entrusted to it.

Finally, there is no basis for application by analogy of the doctrine of judicial deference to arbitration prescribed by this Court's *Steelworkers* trilogy (363 U.S. 574). Judicial authority to enforce contract rights arises from the act of the parties in creating an enforceable agreement, and there was no reason in *Steelworkers* to preclude private contracting parties from preferring arbitrators to courts for resolution of their differences. But the contracting parties to collective bargaining agreements have not agreed to arbitrate claims of NLRA violation. The rights the Board enforces arise from the National Labor Relations Act, not private agreements, and arbitrators have no power to enforce those statutory rights.

In sum, there is no credible basis for the interference of the Circuit Courts in *Square D* and *Sinclair Refining* with the Board's power to construe collective agreements where necessary to resolution of an issue within the statutory competency of the Board.

resisted on the ground that the underlying claim is not justiciable, it is necessary and appropriate that the jurisdictional challenge first be resolved. That is because a resolution favorable to the employer—holding that the subject of a pending complaint is not grievable under the contract—*vitiates* the union's need for the information sought upon the merits. In the analogous area of discovery in civil litigation, where a defendant resists disclosure on the ground that the court is precluded from assuming jurisdiction over plaintiff's suit, such discovery will not be allowed because inquiry into the merits is properly "deferred until the court has decided the question of jurisdiction." 4 Moore, *Federal Practice*, 2302-2303 (2d. ed. 1950). Cf. Fed. Rules Civ. Proc. (Rule 12(h)); *Ambassador East* v. *Orsatti, Inc.*, 155 F. Supp. 937 reversed on other grounds, 257 F. 2d 79 (C.A. 3, 1958); *E. K. Carey Drilling Co.* v. *Murphy*, 113 F. Supp. 226; *Ackerman* v. *J. I. Case Co.*, 74 F. Supp. 639.

Thus, it is clear that when an employer's challenge to the justiciability of the underlying grievance requires that the contract first be construed, there is at least a conceivable argument for Board discretion to defer to an arbitrator in a case presenting a difficult constructional question. But this case does not present that situation for the Company did not and could not suggest non-justiciability. The Company has, from the first, simply relied upon its *ipse dixit* that it has not violated the contract and that the pending grievances are accordingly without merit. Yet a defendant's mere protestation of non-liability can hardly foreclose the plantiff's right to discovery. After all, the very *purpose* of discovery is to facilitate trial of the liability issue. To preclude discovery because defendant's liability has not yet been adjudged, is simply to bar the concept of discovery at its very heart. It is too late in the day, we submit, to bar a union's statutory right to the facts directly relevant to a pending contract grievance on the

mere ground that the employer denies the violation alleged. See *Fafnir Bearing Co.* v. *NLRB*, 35 U.S.L. Week 2009; *Curtiss-Wright Corp.* v. *NLRB*, 347 F. 2d 61; *Timken Roller Bearing Co.* v. *NLRB*, 325 F. 2d 746, cert. den. 376 U.S. 971.

Nor is the Company's position improved by pointing to the provision of the contract which gives it the prerogative of making such operations changes as the contract does not forbid. At most, that presents the usual situation wherein the employer's managerial prerogatives are affirmatively secured by the contract to the extent not affirmatively restricted. But the Union's need for the information sought is in no way vitiated by the possibility that if the matter is ultimately presented for arbitral resolution and the employer prevails, then his challenged equipment removal is not only not interdicted by the contract but is actually protected by it. And if, for sake of argument, the employer's contract claim of prerogative be viewed as indirectly challenging the grievability or arbitrability of the pending grievances, the Union's discovery right would still remain intact. For, at the very least, the material facts the Union seeks upon the cause and destination of the equipment removal bear directly upon any claim of non-grievability because of management prerogative—the prerogative *falls* if the equipment removal reflects subcontracting or relocation and so does the claim of nongrievability. Under the analogous federal discovery rules, a plaintiff is clearly entitled to discover information which is relevant to the defendant's challenge to jurisdiction.[6] No reason appears for a different rule in grievance-arbitration negotiation. Thus, while we would

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[6] *Land* v. *Dollar*, 330 U.S. 731, 735 n. 4; *Collins* v. *New York Central System*, 117 App. D.C. 182, 327 F. 2d 880; *Urquhart* v. *American-La France Foamite Corp.*, 79 App. D.C. 219, 144 F. 2d 542, cert. den. 323 U.S. 783; *Ziegler Chemical & Mineral Corp.* v. *Standard Oil Co. of Calif.*, 32 FRD

in any event urge the point to be a distortion, the Company could gain no additional strength by now characterizing its "prerogative" argument as a challenge to grievability, since the facts the Union seeks directly bear upon any Company contention in that regard.

In sum, whatever might be said for judicial preclusion of Board authority to require disclosure of grievance information prior to arbitral resolution of the employer's challenge to the grievability of the underlying claim, this case does not present that issue. On the contrary, here an arbitral validation of the Company's plea that it has not violated the contract could in no way impair the Union's present right under Section 8(a)(5) of the NLRA to the material facts upon the merits of pending grievances. Those grievances are justiciable and the information sought is clearly pertinent; the ultimate availability of arbitration simply has nothing to do with the Union's present need to know the facts for effective grievance handling and presentation.

The National Labor Relations Act seeks voluntary adjustment of labor-management differences. Arbitration or litigation of contract violation claims is a last resort when bargaining has failed, and certainly the possibility of compulsory adjustment at the end of the line is no substitute for an informed process of grievance negotiation. The Circuit Court's commingling of grievance information and grievance validity denies the Union its statutory right to facts necessary for informed bargaining of contract grievances.

241; *General Industries Co.* v. *Birmingham Sound Reproducers, Ltd.*, 26 FRD 559; *River Plate Corp.* v. *Forestal Land Co.*, 185 F. Supp. 832; *Yudin* v. *Carroll*, 57 F. Supp. 793; *Jiffy Lubricator Co.* v. *Alemite Co.*, 4 FRD 273; *Watters* v. *Ralston Coal Co.*, 25 F. Supp. 387, 387-388; Fed. Rules Civ. Proc. rule 26(a), (b); Moore, *Federal Practice* 2467, 2468 (1st ed. 1938); 4 Moore, *Federal Practice*, 2302-2303 (2d ed. 1950).

Conclusion

We respectfully submit that this is a plain case of fact discovery necessary for a labor union's effective litigation of claimed contract violations in grievance-arbitration. The lower Court nowhere impugned the precept that Section 8(a)(5) of the Act affords such information rights to the Union. But by its holding that the ultimate step of arbitration must precede the right to discovery of the facts the Court put the cart before the horse.

In the labor relations grievance-arbitration process no less than in civil litigation, discovery of facts is needed before the resolution of the underlying claim, for afterwards it serves no practical purpose. Accordingly, this Court should reinstate the Labor Board's ruling which assures the Union the information necessary for its effective handling of pending grievances in the "continuing process of collective bargaining".

Respectfully submitted,

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APPENDIX

Summary of Information Relative to 1963–1964 G.M. Grievances
(supplied to UAW by General Motors Corporation by communication of July 18, 1966)

	Year 1963		Year 1964	
	Number Grievances Settled	Percent Grievances Settled	Number Grievances Settled	Percent Grievances Settled
Written grievances open—beginning of period	16,291		19,490	
Written grievances open—ending of period	19,490		16,036	
Grievances written	137,966		158,051	
Written grievances settled—Step One (Foreman)	30,369	22.5%	32,549	20.2%
Grievances settled—Step One (Higher Supervision)	57,148	42.4%	76,875	47.6%
Total grievances settled—Step One	87,523	64.9%	109,424	67.8%
Grievances settled—Step Two, Sub-Committee	3,633	2.7%	5,762	3.6%
Grievances settled—Step Two, Shop Committee	30,017	22.3%	34,618	21.4%
Grievances settled—Step Three	13,510	10.0%	11,656	7.2%
Grievances settled by Umpire	84	0.06%	45	0.028%

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 52

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ACME INDUSTRIAL COMPANY, ET AL.[1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 129–133) is reported at 351 F. 2d 258. The Board's decision and order (R. 26–33) are reported at 150 NLRB 1463.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1965 (R. 134). The petition for a writ of certiorari was filed on January 4, 1966, and was granted on February 21, 1966 (R. 135; 383 U.S. 905).

[1] On May 2, 1966, this Court entered an order permitting Amalgamated Local 810, International Union, United Automobile, Aerospace and Agricultural Workers of America, AFL–CIO, the charging party before the Board, to intervene as a party in this proceeding.

The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. Sec. 160(e)).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, and the Labor-Management Relations Act are set forth in the Appendix, *infra*, pp. 35–38.

QUESTION PRESENTED

Whether the existence of grievance and arbitration machinery in a collective bargaining agreement deprived the Board of power to determine whether the employer had violated the National Labor Relations Act by refusing to furnish the Union with information necessary to its administration of the agreement.

STATEMENT

In April, 1963, at the conclusion of a strike, the Company (a manufacturer of tools and metal products) and the Union (see n. 1, *supra*) entered into a collective bargaining agreement covering the employees at the Company's Laflin Street plant in Chicago. The contract contained two substantive provisions relevant to this case. Under Article I, Section 3 (R. 27, 96), the Company agreed "not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company."

Article VI, Section 10 (R. 27, 102), provided that, "[i]n the event the equipment of the plant or of any department * * * is hereafter moved to another location of the Company, employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority * * *." The contract also contained procedures for the processing of grievances, culminating in a provision for binding arbitration (R. 98–100). A grievance was defined as "a difference of opinion with respect to the meaning and application of the terms of this Agreement" (R. 98).[2]

On or about January 8, 1964, the Union discovered that machinery was being moved from the Lafiin Street plant. Its stewards asked foremen why the machinery was being removed and where it was being relocated. The foremen replied that there had been no violation of the contract and that the Company, therefore, was not obliged to furnish this information. (R. 27; 64–67, 70–72).[3] Thereafter, between January

[2] The subcontracting clause (Article I, Section 3) also specifically provided (R. 96) that a violation thereof "will be subject to the grievance procedure." In describing the arbitrator's authority, the agreement provided that he may not "change, alter, detract from or add to the provisions of this Agreement, * * * his authority being limited to the interpretation of the terms of this Agreement" (R. 100).

[3] For example, Rudolph Rich, the Union's vice president and a steward, asked Foreman Steelhammer "if he would give me, as a union representative, the information that we were aware of the fact that machinery was being moved out of the plant

13 and March 3, 1964, the Union invoked the initial steps of the grievance machinery with regard to eleven grievances charging that the Company, by removing machinery from the plant and by subcontracting the work previously performed on those machines, had violated the recognition, subcontracting, and work-transfer clauses of the contract (R. 27; 109–123, 44).[4]

On April 3, 1964, the president of the Union wrote a letter to the Company requesting information concerning the date on which each piece of equipment was moved out of the plant; the place to which the equipment was moved and whether such place was a facility owned or controlled by the Company; the number of machines or equipment moved; the reason or purpose of the move; and whether the equipment was used for production elsewhere. The letter asserted that this information was "essential to the Union for the servicing and administration of the current contract." (R. 27–28, 21–22; 124). By letter of April 16, 1964, the Company declined to furnish

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which without this information forthcoming we were unable to continue—or even originate the filing of a grievance" (R. 64). Steelhammer, after checking with the Company's industrial relations manager, advised Rich that "the Company felt that they were not in violation of the contract and, therefore, they did not feel compelled to give the Union any definite answer as to why the machinery was moved or where" (R. 65).

[4] Many of the grievances alleged that the Company's action had deprived employees of job rights and employment (see R. 109, 111, 112, 119). Between April, 1963, when the Company resumed operations after the strike, and the Board hearing in August, 1964, the number of employees in layoff status ranged from 30 to over 75. In addition, employment at the plant dropped from about 190 to 115. (R. 60–61.)

this information, on the ground that "[w]e are aware of no layoffs nor of any reductions in any classification within five (5) working days prior to your letter" (five days being the time within which grievances relating to layoffs were required to be filed under the collective agreement, see R. 100), that the Union had "available all the information [it needed] to determine whether or not any employees' rights are being violated," and that its questions were "indicative of a fishing and harassment expedition" (R. 28, 22–23; 125–126).

The Union then filed unfair labor practice charges with the Board, alleging that the Company's refusal to furnish the requested information constituted a refusal to bargain collectively in violation of Section 8(a)(5) of the National Labor Relations Act. A complaint was issued on these charges. (R. 2–8.)

The Board held that the Act had been violated.[5] It found first that the information sought by the Union was relevant to the Union's administration of the agreement as statutory representative because such information was "necessary in order to enable the Union to evaluate intelligently the grievances filed and to determine whether such grievances were meri-

[5] The trial examiner initially recommended that the complaint be dismissed (R. 17–25). Although recognizing that the issue before him was "a matter of policy for the Board and not an examiner to decide," the examiner ruled that "I would not hold that the Respondent has committed an unfair labor practice by withholding information where the dispute has been contemplated by the parties in making their contract and binding arbitration has been established to resolve that dispute" (R. 24–25).

torious, and whether to press for arbitration. The denial of such information deprives the Union of an opportunity to know whether jobs and machinery have been moved out of the plant under circumstances entitling employees, especially those in layoff status, to follow the jobs or entitling the Union to grieve over improper subcontracting." The Board then found that the contract contained no "clause by which the union waives its statutory right to such information. The mere existence of a grievance machinery terminating in arbitration is not to be construed as a waiver of the Union's statutory right to such information." (R. 29.) The Board concluded that the bargaining obligation imposed by Section 8(a)(5) of the Act had been violated (*ibid.*) and it ordered the Company to provide the Union, on request, with "information concerning the removal of equipment and machinery from its plant" (R. 30–31).

On cross petitions to review and to enforce the Board's order, the court of appeals denied enforcement and set aside the order (R. 129–133). The court did not upset the Board's finding that the requested information was relevant to the Union's performance of its statutory representative function, nor did it dispute the Board's conclusion that the Union had not expressly waived its statutory right to such information. The court ruled, however, that the existence in the collective bargaining agreement of a provision for binding arbitration of differences concerning the meaning and application of that agreement precluded the Board from exercising its ordi-

nary unfair labor practice authority here. In the court's view, "[t]he factors bearing on a determination of the relevancy of the information requested are interrelated with a construction and application of the contract provisions. The latter is a matter exclusively reserved for the arbitrator" (R. 132).

ARGUMENT

THE GRIEVANCE AND ARBITRATION PROCEDURE IN THE COLLECTIVE BARGAINING AGREEMENT DID NOT PRECLUDE THE BOARD FROM FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) OF THE ACT BY REFUSING TO FURNISH THE UNION WITH INFORMATION NECESSARY TO THE PROPER PERFORMANCE OF ITS REPRESENTATIVE FUNCTION

Introduction and Summary

The question in this case is whether the Board may find that an employer has failed to bargain in good faith under Section 8(a)(5) of the National Labor Relations Act (29 U.S.C. 158(a)(5)) by refusing to furnish the union with information necessary to the proper performance of the union's statutory representative function under a collective bargaining agreement when that agreement contains grievance and arbitration machinery for resolving differences over "the meaning and application of" its terms. The court of appeals held the exercise of the Board's power to be precluded and has remitted the Union to whatever remedy may be afforded to it through arbitration. We disagree with this incursion into the

Board's statutory responsibility to enforce the provisions of the Act.[6]

We start with two premises regarding the meaning of the National Labor Relations Act, both of which we believe to be common ground here. First, we believe it to be unquestioned that the duty to bargain imposed under Section 8(a)(5) of the Act does not ordinarily terminate with the execution of a collective bargaining agreement, but continues through the life of the agreement. Parties must thus administer questions arising under the contract—no less than questions relating to the formation of a contract—consistently with the principles of the Act. *Conley* v. *Gibson*, 355 U.S. 41, 46; *J. I. Case Co.* v. *National Labor Relations Board*, 253 F. 2d 149 (C.A. 7). Were any confirmation of this principle needed, it is explicitly provided by Section 8(d) of the Act (29

[6] The question in this case is, to some extent, related to the question presented in No. 53, O.T., 1966, *National Labor Relations Board* v. *C & C Plywood Corp.* Like the issue here, the question in No. 53 concerns the power of the Board to resolve unfair labor practice disputes related to provisions of existing collective bargaining agreements. In this case, however, as we show *infra*, the Board may resolve the statutory unfair labor practice controversy without, in fact, resolving any issue of contract interpretation which would be within the function of an arbitrator to decide, while in No. 53 a contract interpretation issue was concededly relevant to the Board's statutory determination. On the other hand, the contract in No. 53, unlike the contract here, did not contain grievance and arbitration procedures for resolving differences in contract interpretation. While we urge in both cases that the Board's statutory power was not precluded, we agree that because of these differences, separate consideration of the issues in the two cases is appropriate.

U.S.C. 158(d)) which defines the duty to bargain imposed by Section 8(a)(5). The definition of Section 8(d) expressly includes, not only the duty to "confer in good faith with respect to * * * the negotiation of an agreement," but also the duty to confer subsequently with respect to "any question arising thereunder."

Our second premise—which we also believe to be unquestioned here—is that the duty to bargain thus imposed ordinarily includes the duty to furnish information needed in order to permit the other party to statutory bargaining—either before or after a contract is concluded—to discharge its functions intelligently and effectively. This Court has expressly so held with regard to information requested in the course of contract negotiations (*National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149),[1] and the same principle has also been applied in numerous cases with regard to information relating to the administration of existing agreements (*National Labor Relations Board* v. *Woolworth Co.*, 352 U.S. 938, reversing, 235 F. 2d 319 (C.A. 9); *National Labor Relations Board* v. *Item Co.*, 220 F. 2d 956 (C.A. 5), certiorari denied, 350 U.S. 836; *J. I. Case Co.* v. *National Labor Relations Board*, 253 F. 2d 149 (C.A. 7); *National Labor Relations Board* v. *Whitin Machine Works*, 217 F. 2d 593 (C.A. 4), certiorari denied, 349 U.S. 905; *Boston Herald-Traveler Corp.* v. *National Labor Relations*

[1] See, also, *e.g.*, our brief in opposition in *Sylvania Electric Products, Inc.* v. *National Labor Relations Board*, No. 373, O.T., 1966.

Board, 223 F. 2d 58 (C.A. 1)). We take it as established, therefore, that a party who refuses to supply such information despite a proper request is ordinarily in default of its statutory obligation to bargain in good faith and has committed an unfair labor practice.

The present case involves a request for information relating to the bargaining process after a contract had been concluded. The parties to the agreement here—respondent and the Union, a local of the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO—entered into a collective bargaining agreement covering one of respondent's several plants. This agreement (R. 95–108) contained two substantive provisions central to the Union's request for information. One provision (Article I, Section 3) provided that "[i]t is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company" (R. 96). The other (Article VI, Section 10) provided that "[i]n the event the equipment of the plant or of any department, entirely or partially, is hereafter moved to another location of the Company, employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority * * *" (R. 102).

Some months after the collective bargaining agreement containing these provisions had been executed, the Union discovered that machinery was being re-

moved from the plant covered by the agreement. (The fact that machinery was, in actuality, removed is not contested.) Such removal of machinery could potentially—depending upon the place to which the machinery was removed and the use made of it there—constitute a violation of one or both of the quoted provisions; if the machinery was removed to a subcontractor, Article I, Section 3, might be violated, and if it was removed to another plant owned by respondent without giving employees a right to transfer to that plant, Article VI, Section 10 might be violated. The Union's role in the administration and supervision of the agreement—including its role in processing grievances on behalf of particular employees who might be adversely affected by any violations of the two provisions—was thus directly involved.[8] In these circumstances, the Union sought information regarding the place to which each piece of machinery had been removed and the use which was being made of it in that place; ultimately, these requests were embodied in a letter written to respondent. (R. 124.) Respondent in all cases refused to give the requested information (R. 27–28, 125–126.)

The Board found that the respondent had thereby violated Section 8(a)(5) of the Act. Applying the

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[8] The Union's role in processing grievances, including the exclusive right to invoke the final stages of the grievance procedure as well as the exclusive right to invoke binding arbitration, is set out in Article IV of the contract (R. 98–100). In this case, the grievance procedure had in fact been invoked by the Union in eleven instances growing out of the transfer of machinery, by the time the Union's request for information was incorporated in a formal letter (R. 111–123).

two principles noted above, the Board ruled that "[i]t is clear that Section 8(a)(5) of the Act imposes an obligation upon an employer to furnish upon request all information relevant to the bargaining representative's intelligent performance of its function." The refusal to furnish information here violated these precepts because it deprived "the Union of an opportunity to know whether jobs and machinery have been moved out of the plant under circumstances entitling employees, especially those in lay-off status, to follow the jobs [under Article VI, Section 10] or entitling the Union to grieve over improper subcontracting [under Article I, Section 3]." While the Board recognized that the statutory right to such information might be waived by the Union through the contract, it noted that the contract contained no express waiver and it held that "[t]he mere existence of a grievance machinery terminating in arbitration is not to be construed as a waiver of the Union's statutory right to such information." (R. 29.)[9]

[9] It is settled law that a waiver of statutory rights will not be inferred, but must be clear and unmistakable. See, *e.g.*, *National Labor Relations Board* v. *Perkins Machine Co.*, 326 F. 2d 488 (C.A. 1); *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 751 (C.A. 6), certiorari denied, 376 U.S. 971; *National Labor Relations Board* v. *Item Co.*, 220 F. 2d 956, 958–959 (C.A. 5), certiorari denied, 350 U.S. 836; *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947, 949 (C.A. 2); *Fafnir Bearing Co.* v. *National Labor Relations Board* (C.A. 2), June 17, 1966, 62 LRRM 2415, 2419. This rests on the theory that, since a provision protecting a statutory right "would normally be implied in an agreement by operation of the act itself" (*National Labor Relations Board* v. *Perkins Machine Co.*, 326 F. 2d 488, 489

The court of appeals disagreed with neither of the legal premises upon which the Board's decision had been based, *i.e.*, that the statutory duty to bargain ordinarily exists with relation to the administration and enforcement of a collective bargaining agreement and that that duty ordinarily includes the duty to furnish relevant information to the statutory bargaining representative; nor did it find erroneous the Board's finding of fact that the information requested in this case by the Union was, in fact, relevant to the performance of its statutory representative function. The court, moreover, did not contest the Board's finding that no provision of the collective agreement in this case constituted either an express or an implied waiver in fact of the Union's ordinary right to such information.

The court, however, ruled that the Board's decision had not properly taken into account an additional factor which, in the court's view, displaced the Board's normal unfair labor practice authority here. This factor was the presence in the collective agreement of grievance and arbitration provisions under which differences with respect to the meaning or application of the subcontracting and work transfer provisions of Article I, Section 3, and Article VI, Section 10, were subject to final and binding arbitration. The court believed that "[t]he factors bearing on a determination of the relevancy of the information requested are interrelated with a construction and application

(C.A. 1)), that protection can be lost only by express action. See also *Cloverleaf Division of Adams Dairy*, 147 NLRB 1410, 1413–1414.

of those contract provisions" and the latter was "a matter exclusively reserved for the arbitrator" by the contract (R. 132). In these circumstances, the court held that "Board intervention to make the determination of relevancy in the light of its independent interpretation of the meaning and application of the contract provisions contravenes the policy expressed in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, concerning the priority which should be accorded the grievance and arbitration procedures and machinery provided for in the contract," as well as "the national policy embodied in Section 203(d) of the Labor-Management Relations Act (29 U.S.C.A. § 173) that '[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement'" (R. 132–133).

This decision was, we submit, erroneous. In the first place, the Board's unfair labor practice decision here did not, in fact, depend upon the Board's resolution of differences between the parties concerning the meaning or application of the substantive provisions of the collective bargaining agreement. The respondent in this case has not sought to justify its refusal to furnish the requested information by reliance upon a construction of Article I, Section 3, or Article VI, Section 10, different from that asserted by the Union, and no such question was presented to or decided by

[10] The Company has merely attempted to show that no employees were laid off or otherwise adversely affected as a result

the Board. Nor did the Board's decision involve a disputed application of those provisions; it held only that the Union was entitled to the requested information in order intelligently to decide whether to raise a question of application in arbitration.[10] In these circumstances, we think it plain that the Board's decision could not in any way interfere with the statutory and judicial "policy of effectual achievement of contractual arbitration." On the contrary, as we shall show, the Board's decision of the unfair labor practice question in such a case actually facilitates the grievance and arbitration process under the agreement, while the contrary decision would constitute a serious hindrance to the proper functioning of that process.

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of the machinery removal and the subcontracting (Opposition to Petition for Certiorari 3–4, 6; see also the Company's letter refusing to furnish the information, R. 125–126). While these facts would bear on the merits of any grievance which the Union might choose to press through the grievance and arbitration machinery, we think it obvious that the Union's statutory right to information relating to whether subcontracting or machinery removal had occurred did not depend upon the Union's first establishing that employees were, in fact, adversely affected by such actions. In the first place, it would be impossible for the Union to determine that, for example, subcontracting had caused a particular layoff or a diminution of the work available in the plant without knowing whether subcontracting had, in fact, occurred; nor could the explanation which the Company might offer for a layoff or work reduction be evaluated without the Union's having knowledge of whether subcontracting or machinery removal had occurred. In addition, we think it clear that the Union, as part of its representative role in the administration of Article I, Section 3 and Article VI, Section 10, would have a right to know whether subcontracting or machinery removal had occurred, whether or not layoffs or work reductions had yet taken place as a consequence. See *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 69–70 (C.A. 3).

Secondly, we believe that, even if respondent here had invoked an arbitral difference over the meaning or application of the contract as a reason for refusing to supply the information requested by the Union, the court was wrong in ruling that the Board's statutory authority to find and remedy an unfair labor practice was thereby absolutely precluded.[11] Again, the exercise of the Board's unfair labor practice power in order to inform the union prior to initiation of arbitration will ordinarily aid, rather than hinder, the arbitral process. Nor need the Board, in exercising its statutory authority, in fact determine the arbitral issue between the parties; the Board's decision may rest solely on the basis that the union's contentions are substantial, and that it ought to be afforded the information relevant to the development of those contentions. On the other hand, the assertion of insubstantial contract contentions should certainly not be given the effect of precluding Board jurisdiction to require good faith bargaining. Finally, the Board's power in these circumstances, despite the existence of an arbitration provision, is directly supported by explicit statutory language in Section 10(a) of the Act.

In sum, we take no issue in this case with the strong policy, relied upon by the court of appeals, favoring the arbitral solution of labor disputes when the applicable collective bargaining agreement provides for

[11] The question whether the Board has power to act on an unfair labor practice charge that involves a threshold issue of contract interpretation is directly presented in a companion case, *National Labor Relations Board* v. *C & C Plywood Corp.*, No. 53, this Term. See footnote 6, *supra*, p. 8.

such arbitration.[12] In this case, however, we submit that the Board's decision in no respect collided with that policy while, at the same time, the Board has supported the efficient functioning of arbitration procedures as the applicable policy requires by requiring the production of relevant information prior to the initiation of the arbitration process.

A. NO ARBITRAL ISSUES WERE PRESENTED TO THE BOARD IN THIS CASE; THE BOARD'S POWER WAS THEREFORE PLAINLY NOT PRECLUDED BY THE ARBITRATION AGREEMENT

The Board, in finding an unfair labor practice here, was not called upon to perform any function of contract interpretation subject to arbitration under the arbitration clause of the collective agreement. Under that clause, an arbitral grievance is "a difference of

[12] See *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593. *American Mfg.* and *Warrior Gulf* were suits to compel arbitration of grievances, and *Enterprise Wheel* was a suit to enforce an arbitrator's award. In all three cases, the employer claimed that, while there was an arbitration clause in the collective agreement, he had not agreed to arbitrate the particular questions involved, and therefore the court should decline to order arbitration or (in *Enterprise Wheel*) to enforce the arbitrator's award. This Court held that, since arbitration is a desirable process for the resolution of disputes over the interpretation of labor agreements, the courts should not assess the merits of the grievance in determining arbitrability, but instead should order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf*, *supra*, 363 U.S. 574, 582–583.

There is nothing in these decisions which purports to limit the Board's remedial authority under the NLRA. See *Lodge 743, Machinists* v. *United Aircraft Corp.*, 337 F. 2d 5, 10–11 (C.A. 2), certiorari denied, 380 U.S. 908.

opinion with respect to the meaning and application of the terms of this Agreement" (R. 98). No such difference respecting the two provisions of the agreement here involved—Article I, Section 3, and Article VI, Section 10—existed between the parties in this case in regard to the Union's request for information.[12a]

Article I, Section 3, and Article VI, Section 10 (R. 96, 102) make it a violation of the contract for the respondent to move machinery either to a subcontractor or to another plant owned by respondent where such movement would deprive employees covered by the agreement of any work. As we understand its position, respondent does not argue—nor could it tenably so argue under the plain contractual language—that such movements of machinery are left to its unilateral control under these provisions.[12b] The restrictions placed by the contract upon the Company in this regard are thus clear; and the Union's role under the contract in enforcing those restrictions is also undisputed.[13] In these circumstances, it seems unquestionable that, while the Union's request for information pertained to the administration of the two contract provisions, no issue regarding contract meaning was presented by that request. Rather, the differ-

[12a] The Company, of course, disputed the "application" of the clauses in the sense that it urged, and still urges, that they have not been violated. The Board plainly did not decide this question, but merely required the production of information so that the Union could intelligently decide whether, and how, to take these questions to arbitration.

[12b] See also footnote 2, *supra*, p. 3.

[13] See footnotes 8 and 10, *supra*, pp. 11, 14–15.

ence between the parties related to the Union's right to secure information which would indicate to it whether the clauses had been violated.

When the Board upheld the unfair labor practice claim, therefore, it did not decide, nor did it need to decide, any difference between the parties over the meaning or application of Article I, Section 3, Article VI, Section 10, or any other contract provision.[14] The only dispute which the Board resolved was a statutory dispute over the information which Section 8(a)(5) of the National Labor Relations Act requires an employer to furnish a union in the course of the administration of a collective bargaining agreement. As

[14] It is true that, hypothetically, an employer in a case such as this one, while not disagreeing with the union over the meaning of any substantive contract provision, might point to a provision of the contract dealing with the grievance procedure under which it might contend that the union had waived its normal statutory right to secure information relating to potential grievances. Conceivably, for example, the grievance provisions of a particular contract might explicitly deny the union the right to such information in connection with procedures which placed the prosecution of certain grievances solely in the hands of the employee involved, rather than the union. Should such a contract provision exist, the meaning or applicability of which was the subject of a difference of opinion between the parties, an arbitrable question of contract interpretation would be presented and the analysis in the latter part of this brief, *infra*, pp. 27–34, would become pertinent.

In the present case, however, respondent relied on no such contract provision in refusing to furnish the requested information, nor did such a provision exist in the agreement. As the Board noted (R. 29), "the contract does not contain a clause dealing specifically with the furnishing of information necessary and relevant to the processing of grievances or any other clause by which the union waives its statutory right to such information."

noted above, *supra*, pp. 8–12, we believe that the Board clearly resolved this statutory question consistently with established principles regarding the meaning of the duty to bargain under the Act as it relates to the obligation to supply information.

If the foregoing analysis of the issue before the Board in this case is correct, it is evident that the Board's power should not have been deemed precluded by any actual or potential conflict with the arbitration remedy under the contract. No arbitral issue relevant to the request for information existed and, consequently, no conceivable conflict with an arbitrator's function was present. Should the Union ultimately decide to carry the dispute to arbitration, the Board will have decided no issues which will be presented to the arbitrator. The Board's decision, for example, does not preclude the Company from urging in arbitration that machines were not removed to a given place, that such removal did not violate the contract, or that employees were not entitled to complain because work opportunities were not lost. We now show, in addition, that the Board's exercise of power in cases like the present one not only does not conflict with subsequent arbitration, but actually considerably facilitates the arbitral process.

Arbitration is usually the last, as well as the most costly, step in a contractual grievance procedure. Thus, the procedure prescribed by the collective bargaining agreement in this case (see R. 98–100), which is typical, had four steps: (1) the employee, his

steward, and his foreman first attempt to adjust the grievance; (2) if the matter is not satisfactorily settled, the steward then submits the grievance in writing to the Union's shop committee and representatives of the Company's industrial relations department; (3) if there is still no satisfactory settlement, the Union may "appeal" to the company's industrial relations department; and (4) after these steps have been exhausted, the Union may take the grievance to an arbitrator selected by the Union and the Company from a panel provided by the Federal Mediation and Conciliation Service; the Company and the Union each pay half the expenses of the arbitrator.

This procedure plainly contemplates that many, if not most, grievances will be disposed of at the early stages of the grievance procedure—short of formal arbitration—either because investigation by the union shows them to be without merit or enables the union to persuade the employer that some adjustment should be made, or because the union, for other valid reasons, decides not to press the grievances.[15] Furnishing the union with information pertaining to a grievance at these earlier stages clearly effectuates this process because it enables the union to make an intelligent decision on whether and how to process the grievance.

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[15] For example, the experience of the United Steelworkers of America and the United Automobile Workers under their contracts with United States Steel and General Motors, respectively, shows that most grievances have been "settled"—*i.e.*, granted, compromised, or dropped—in the lower steps of the grievance procedure, short of arbitration. See the *amicus* brief of the AFL-CIO, submitted in support of the petition for certiorari in *Vaca* v. *Sipes*, No. 114, This Term, pp. 4–5, certiorari granted, 384 U.S. 969.

By precluding the Board from finding the refusal to furnish information to be an unfair labor practice, on the other hand, the decision of the court of appeals would mean that, if the employer so chooses, information pertaining to a grievance could only be obtained from an arbitrator after the decision to press for arbitration had been made. The union would therefore frequently have to decide whether to utilize the grievance and arbitration machinery without an adequate opportunity to determine whether the grievance involved had any merit; indeed, the union would often be forced to exhaust the entire grievance and arbitration mechanism in order to find out whether a grievance should have been brought at all. As a result, some insubstantial grievances would be fully pressed through the contractual machinery (where, with adequate information, they would have been abandoned); some meritorious grievances would be pressed to arbitration with the union groping through the proceeding inadequately prepared; and the union would also undoubtedly be forced, because of the substantial cost involved, to abandon many grievances which adequate information might, in fact, have shown to be meritorious. The net result would be to clog arbitration procedures and make them more cumbersome, protracted, and expensive than heretofore, as well as seriously to impair the union's statutory right to information pertinent to its representative function. "If the union is entitled to the information, it is entitled to have it well in advance of any arbitral hearing to enable it to decide whether

to grieve or continue to press an unresolved grievance for use in grievance discussions with management representatives and in preparation for arbitration. Even if these needs could be met by a continuance granted at the [arbitration] hearing—and they cannot—the resultant delay and encouragement of litigation would seriously impair the statutory right." Lesnick, *Arbitration as a Limit on the Discretion of Management, Union, and NLRB: The Year's Major Developments*, Proceedings of New York University Eighteenth Annual Conference on Labor 25–26 (BNA 1966).[16]

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[16] See *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 71 (C.A. 3): "Demands for information are usual precursors to the submission of complaints and grievances to grievance and arbitration machinery. This is only natural, for * * * unions would be forced to grope blindly through the early stages of the grievance procedure unless adequate information were preliminarily available." Accord: *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 753 (C.A. 6), certiorari denied, 376 U.S. 971. See also *Fafnir Bearing Co.* v. *National Labor Relations Board*, (C.A. 2), decided June 17, 1966, 62 LRRM 2415, 2419. In holding that the union was entitled to conduct its own time studies to verify those conducted by the company, notwithstanding that the arbitrator would also be authorized to conduct such studies, the court said:

> The reason the Union desired to make "live" tests was not to usurp the function of the arbitrator and thereby interfere with standard grievance procedures; it was needed, instead, to determine whether to take the grievances to arbitration in the first place. By preventing the Union from conducting these studies, the Company was, in essence, requiring it to play a game of blind man's bluff. Only by guess-work could the Union determine which piece rates to protest and which to accept. Of course, the Union always had the option of demanding that *all* griev-

Nor is it an answer to suggest that the union might apply to an arbitrator in advance of instituting grievances and obtain an order compelling the production of the information sought. In the first place, it is not at all clear that the arbitrator ordinarily has such powers. He is not "a judge ruling on pre-trial discovery motions. The arbitrator sits for the determination of disputes unresolved by the grievance machinery but he is not the administrator of that machinery." Lesnick, *Arbitration as a Limit on the Discretion of Management, Union and NLRB, supra,* at 25; see also *Timken Roller Bearing Co.* v. *National Labor Rela-*

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ances on proposed piece work prices be reviewed by the arbitrator; but that alternative obviously would be impractical, expensive and indeed strifebreeding * * *. [Footnote omitted.]

The arbitration process has recently been criticized on the ground that proceedings have become too expensive, protracted and complicated. See Fleming, *The Labor Arbitration Process*, 30, 57-58 (Univ. of Ill., 1965). Moreover, concern has been expressed over the growing backlog of arbitration cases and it has been suggested that the backlog is due, in part at least, to the fact that there are "poor investigative procedures on the part of union representatives, or an unwillingness to screen grievances carefully." See the comments of Arbitrator David H. Stowe at the New York University 19th Annual Conference on Labor, 61 LRR 243, 245 (April 25, 1966). See also Ross, *Distressed Grievance Procedures and Their Rehabilitation*, in Labor Arbitration and Industrial Change, 16th Annual Meeting, National Academy of Arbitrators 104 (BNA, 1963). See also *Collins Radio Co., Texas Division*, 36 LA 815 (arbitrator unable to determine claim that employer had assigned bargaining unit work to non-unit employees because the evidence produced was incomplete; the deficiency was due to the fact that the union had been denied access to the plant for the purpose of investigating the grievance).

tions Board, 325 F. 2d 746, 751–754 (C.A. 6), certiorari denied, 376 U.S. 971. These doubts regarding an arbitrator's power to supervise the grievance machinery seem especially strong in the case of a typical contract, like the one at bar, which does not establish a permanent umpire or arbitrator, but which provides that the arbitrator be chosen *ad hoc* when a dispute arises and the grievance mechanism is exhausted. An arbitrator is, in addition, usually without the power of subpoena to compel production of information. The proposed United States Arbitration Act, for example, drafted by a committee of arbitrators, does not include a provision for subpoenas. See *Challenges to Arbitration*, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators 164 (BNA, 1960); see also Fleming, *The Labor Arbitration Process* 175 (Univ. of Ill. 1965); Elkouri, *How Arbitration Works* 181–182 (BNA 1960). Finally, even where an arbitrator is able to, and does, pass on an information request, he must determine it under the particular requirements of the contract and therefore may not be free to take into account the relevant statutory considerations.[17]

[17] Thus, in *Bethlehem Steel Co.*, 31 LA 423, the union claimed that the employer violated the contract by failing to provide a job classification for each employee along with the seniority list; the arbitrator found that, since the employer provided each employee with his job classification, the contract was not violated, there being no requirement that the information be furnished to the union; however, the arbitrator declined to pass on the question whether the NLRA would have imposed a different requirement on the employer. The arbitrator indicated that "to base his decision on his construction of the law, as in-

In these circumstances, we believe it evident that the Board properly held in this case that it had power to find that the Company had committed an unfair labor practice by refusing to furnish the Union with requested information necessary to the Union's proper performance of its representative functions. The Board's decision enhanced the arbitral process while it created no possible displacement of the arbitration agreement.[13]

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terpreted by NLRB, rather than on his understanding of the Agreement between the parties," would "bring him perilously close to exceeding the authority" granted by the Agreement. *Id.*, at 426. Similarly, in *Natvar Corp.*, 24 LA 753, the union asked for written descriptions of each employee's job; the arbitrator ruled that, since there was no provision in the contract respecting such job descriptions and there was no "past practice" on the matter, he was without authority to compel the production of that information. And, in *Spartan Mills*, 27 LA 256, the union asked for seniority lists, contending that the duty to bargain collectively imposed by the NLRA required the employer to furnish this information, and that such information was necessary to administer the seniority provisions of the contract; the arbitrator ruled that he had no authority to pass on the first issue, since he was merely empowered to determine whether there had been a violation of the contract; he then found that there was no violation of the contract since the union, by agreeing that the employee himself would first take up the grievance with his supervisor, had given up its right to such information. See also *Borg-Warner Corp.*, 9 LA 901.

[13] To require that information pertinent to a grievance be submitted in advance of arbitration and to remedy a refusal to furnish such information as an unfair labor practice, does not unduly delay or complicate the grievance procedure. Cf. *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569, 578–579 (C.A. 5). To be sure, the present case has been in litigation for over two years. But that is because the Company has elected to contest its obligation to furnish the grievance information in advance of arbitration. Once that obligation has been established by the decision of this Court,

B. EVEN IF THE COMPANY HAD RAISED AN ISSUE OF CONTRACT INTERPRETATION IN DEFENDING ITS REFUSAL TO FURNISH INFORMATION, THE BOARD WOULD NOT HAVE BEEN PRECLUDED FROM DECIDING THE UNFAIR LABOR PRACTICE QUESTION

Even if the Company had based its refusal to furnish information in this case upon a contention—which it in fact did not make—that removal of machinery and subcontracting were left to its sole unilateral control by the contract, we submit that the Board could properly have found that refusal to constitute an unfair labor practice.

It is true that it might be urged in such a case that the Union's statutory right to the information requested would depend upon the correctness of the Company's view of the meaning of the collective bargaining agreement, a view which the Company might be deemed entitled to test in arbitration rather than before the Board. That is, it might be argued that the Union would have a right to the information as a predicate to considering the initiation or processing of grievances only if it would, in fact, have a right to initiate grievances over subcontracting or machinery removal. This right, in turn, would be present only if the contract did not leave subcontracting and machinery removal to the employer's unilateral control. Since the latter question—whether the Company does, indeed, have unilateral control over such matters—is a question of contract interpretation which an arbitrator would properly have to determine if a grievance over subcontracting or machinery removal were ultimately

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presumably very few employers will thereafter decline to furnish such information and the necessity for Board litigation will be obviated.

presented to him, the Company might argue that it should not be compelled by the Board to furnish the requested information until an arbitrator has decided the threshold question of interpretation. For, should it be determined in arbitration, contrary to the Board's decision, that the Company does have unilateral control under the contract, the Union would have had no statutory right to the information which the Board already had accorded it. On the other hand, if an arbitrator felt bound in interpreting the contract by the Board's contract interpretation in the earlier unfair labor practice proceeding, the Board would have usurped a function properly delegated to the arbitrator by the contract.

While, as this logic shows, there may well be cases where the Board may properly decline to require the production of information alleged to be irrelevant under the contract, we do not believe that the Board should, as a consequence, be held to be precluded in *all* cases from entertaining an unfair labor practice proceeding merely because an employer bases its refusal to supply requested information upon a contention that the information is not relevant under an asserted interpretation of the collective bargaining agreement.[19]

[19] This position was rejected in *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569 (C.A. 5), and *Square D Co.* v. *National Labor Relations Board*, 332 F. 2d 360 (C.A. 9), which hold that, at least where it is claimed by the employer that the matters complained of by the union have been left to the employer's unilateral control by the contract and

First, Section 10(a) of the Act (29 U.S.C. 160(a)) appears affirmatively to confer jurisdiction on the Board in these circumstances despite the possibility of an arbitral solution of the underlying contract dispute. That Section not only provides generally that "[t]he Board is empowered * * * to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title [Section 8 of the Act]) affecting commerce," but it also explicitly provides that "[*t*]*his power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement*, law, or otherwise * * *" (emphasis added).

Second, just as in the situation described in the preceding section of this brief, where no arbitral question at all is raised, the exercise of Board power to vindicate a union's right to information prior to the institution of arbitration will often facilitate the arbitration process even when a contractual defense may be raised to the grievance claim. For example, the employer may seek to justify the discharge of an employee on the ground that it was for lack of work (a matter left to his unilateral control under the contract), while the employee may contend that the action was in fact motivated by other

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are not grievable, there is no obligation to furnish information until the arbitrator has determined the validity of that contract claim.

In *Hercules Motor Corp.*, 136 NLRB 1648, the Board (with Member Fanning dissenting) expressed a similar view. However, the Board has since confined that case to its particular facts. See *The Timken Roller Bearing Co.*, 138 NLRB 15, 16, n. 4, enforced, 325 F. 2d 746 (C.A. 6), certiorari denied, 376 U.S. 971; *Metropolitan Life Ins. Co.*, 150 NLRB 1478, 1479, n. 1.

considerations and was thus in violation of the provision of the contract barring discharge except for "just cause." See *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569 (C.A. 5). To permit the union to obtain information relating to the grievance in advance of arbitration in such a case would better enable it to assess the employer's contention that the subject matter of the grievance has been left to his unilateral control, and to determine whether to carry the problem to arbitration. Thus, where the employee has been discharged allegedly for lack of work, information with respect to the work load of the department and any newly-hired employees would help the union to determine whether lack of work was really the reason for the discharge. If the information tends to confirm the employer's contention, the union would be able to decide not to carry the employee's grievance to arbitration; on the other hand, if the information tends to cast doubt on the validity of the employer's asserted reason, the union might decide to proceed to arbitration, for, in these circumstances, there is a reasonable likelihood that it would be able to persuade an arbitrator that the discharge was not privileged under the clause relied on by the employer, but rather was in violation of the "just cause" clause. If the union cannot obtain information about work load, on the other hand, it will have no sound basis for evaluating the employee's claim; it makes little sense to require the union to press such a claim to arbitration before it is able to evaluate it.

Third, even though an arbitral issue relevant to the information claim is raised, the Board need not, in fact,

finally resolve such issues between the parties in determining the union's right to the information sought; hence no potential clash with the arbitrator's function of contract interpretation need actually be created by the Board's action. If the Board finds that the issue of contract interpretation raised by the employer is a substantial one, but that the union's contrary interpretation, under which the information requested would be relevant to its statutory functions, is also a substantial position, it may find that the information should be produced, not on the theory that the union is right, but on the ground that the union's position is tenable and has significant chance of ultimate success. In view of the strong interests favoring production of information should its relevancy ultimately be confirmed by an arbitral determination of the contract issues between the parties, the Board may justifiably believe in many cases that the purpose of the good faith bargaining requirement of the Act would better be served, on balance, by furnishing the union with information which might turn out to be irrelevant than by requiring the union to prosecute a possibly valid grievance without any of the necessary factual underpinning. This rule is not dissimilar to that applied in discovery procedures applicable in federal civil cases, when the court is called upon to require the production of information allegedly necessary for trial preparation. See *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947, 949 (C.A. 2); *National Labor Relations Board* v. *Celotex Corp.* (C.A. 5), June 28, 1966, 66 LRRM 2475, 2477. Where the lack of relevancy of such informa-

tion is the ground for refusal to produce, the information may be withheld only if it plainly appears to be irrelevant; if colorable legal claims exist under which the information would be relevant, pre-trial production will be ordered despite the fact that the legal claims will not be determined until the hearing on the merits. See 4 Moore, *Federal Practice*, 1174–1175, 1181 (2d ed); *Garland* v. *Torre*, 259 F. 2d 545, 551 (C.A. 2), certiorari denied, 358 U.S. 910; *Kaiser-Frazer Corp.* v. *Otis & Co.*, 15 Fed. Rules Serv. 522, 525 (S.D.N.Y.)

Finally, there may also be a substantial number of cases where, although the employer formally relies upon a provision or provisions of the contract as a basis for its refusal to furnish information, its contract position is not, in fact, a substantial one.[20] Such a situation presents perhaps the strongest case for Board jurisdiction; the Board should obviously not be automatically precluded from requiring relevant information to be produced—thus seriously undermining the union's role as bargaining representative, merely because a "contract" defense is formulated by the employer, albeit the defense is a wholly insubstantial one which would be bound, ultimately, to fail in arbitration.[21]

We urge, in sum, that the mere existence of a collective bargaining agreement containing grievance

[20] The employer might, for example, purport to rely upon a general management prerogatives clause to defeat a request for information pursuant to specific contractual provisions such as those involved in this case.

[21] Cf. *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583, 585, holding that the mere existence of a management functions clause in the contract was not sufficient to establish that a grievance over subcontracting was not arbitrable.

and arbitration procedures should not be construed as totally foreclosing the Board's ordinary statutory power to determine whether a refusal to furnish relevant information constitutes a refusal to bargain in good faith under Section 8(a)(5) of the Act.[22] This seems especially true when—as in this case—the employer does not base his refusal to furnish the requested information upon any construction of the agreement which would be subject to arbitration. We believe we have also shown, however, that the Board's power should not be totally precluded even when the employer invokes a construction of the agreement as a reason for refusing the information. The exercise of Board power in such cases does not prevent or hinder arbitration, nor need the Board ordinarily determine any arbitral question of contract interpretation in reaching its decision. On the other hand, both the Act and the due administration of grievance and arbitration procedure contemplate that a union be afforded information necessary to enable it intelligently

[22] As suggested above, *supra*, p. 28, this is not to say that the Board will, in all cases, exercise its statutory power to require the production of information regardless of the nature and substantiality of the claim for nonproduction asserted by the employer. One example of such abstention might be where the employer's claim is not only that the requested information is irrelevant to a proper union grievance but that a clause of the contract specifically relating to the production of information accords the employer an affirmative privilege to refuse the union's request. If a substantial basis is presented for crediting the employer's claim of privilege, the Board may well hold in that situation that a balance of considerations counsels that production of the information should not be required until the union's right to the information is vindicated through arbitration.

to pursue the grievance and arbitration machinery, a right which the Board, alone, can effectively vindicate.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed, and the case remanded to the court of appeals with instructions to enforce the Board's order in full.

Respectfully submitted.

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AUGUST 1966.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449), as amended (29 U.S.C. 151, *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions

of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

The relevant provisions of the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et seq.*) are as follows:

SEC. 203. (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

* * * * *

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 52

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

INTERNATIONAL UNION, UAW, AFL-CIO,
AMALGAMATED LOCAL UNION NO. 310,
Intervenor,

vs.

ACME INDUSTRIAL COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR ACME INDUSTRIAL COMPANY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 52.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

INTERNATIONAL UNION, UAW, AFL-CIO,
AMALGAMATED LOCAL UNION NO. 310,
Intervenor,

vs.

ACME INDUSTRIAL COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR ACME INDUSTRIAL COMPANY.

Acme Industrial Company (hereinafter referred to as the "Company") accepts the references to "Opinions Below," "Jurisdiction," and "Statute Involved" set forth in the brief of the Petitioner, the National Labor Relations Board (hereinafter referred to as the "Board"). (The Intervenor shall be referred to herein as the "Union.")

QUESTION PRESENTED.

We note that the Board has phrased its version of the question here presented in terms of the propriety of the Company's refusal to give information to the Union "necessary to its administration of the agreement." (Pet. Br., p. 2.) The question presented in the Board's petition for certiorari characterized the information requested as "relevant to a grievance. . . ." (Petition, p. 2.)

Both Board statements of the question actually beg one of the questions actually involved. One assumes that the information requested was "relevant"; the other assumes the information requested was "necessary." Neither assumption is proper in this case.

We submit that the questions here involved may be stated accurately as follows:

1. Whether it is a refusal to bargain collectively, in violation of Section 8(a)(5) of the National Labor Relations Act, for an employer to decline to furnish a union with information which is not presumptively relevant to wages, hours or other terms and conditions of employment and for which no proof of relevance has been shown.
2. Whether information which may be *related* to a collective bargaining agreement must, *ipso facto,* under the provisions of Section 8(a)(5), be given to the union requesting same.

STATEMENT.

Between January 13 and March 3, 1964, the Union filed eleven grievances under its labor agreement with the Company concerning the removal of certain pieces of machinery (G. C. Exs. 4-A through 4-K; R. 44, 109-123).

The first such grievance claimed that the Company's

removal of a Kleerman machine violated the labor agreement (G. C. Ex. 4-A; R. 44, 109). The Company's reply to this grievance was as follows (G. C. Ex. 4-A; R. 44, 110):

> "The machine involved was moved 10-18-63. This complaint was filed almost 3 months later. No employee was working on the machine at the time of its removal. No employees were reduced in classification or laid off as a result of the machine's removal. There was no contract violation."

The uncontroverted testimony before the Trial Examiner was that the machine in question had at one time been utilized by Tool Room employees; that the number of Tool Room employees had remained unchanged from the commencement of the existing labor agreement to the date of the grievance; and that no Tool Room employee had been reduced in classification during this same period (R. 45-46).

Another later grievance also involved the removal of a second piece of equipment used by Tool Room employees (G. C. Ex. 4-G; R. 44, 117-118) concerning which also the uncontroverted testimony was that no change in Tool Room employees' status had taken place since the labor agreement had gone into effect (R. 52). This grievance stated, in part (R. 117):

> "On Wednesday, Feb. 19, 1964, one Hauser Jig Borer Machine from the Tool Room was moved out of the plant.
>
> "In our written Contract with the Company, we feel the Company is obligated to meet with the Shop Committee of Local # 310 and negotiate any and all machinery being removed from the plant when it displaces or denies employment to Bargaining Unit Employees."[1]

A third grievance challenged the removal of two jeweler's lathes (G. C. Ex. 4-B; R. 44, 111). The uncontroverted

1. Another grievance involved the same equipment, but its claim concerned the Company's refusal to allow the Steward time off to write up the first grievance (G. C. Ex. 4-F; R. 44, 116).

evidence concerning this equipment was that there were two jeweler's lathes in the plant when the labor agreement went into effect, and two in the plant when the grievance was filed (R. 46-47); and that at no time since the effective date of the agreement did the Company employ anyone in the jeweler's lathe classification (R. 47).

In a fourth grievance, the removal of a multiple drill press was challenged (G. C. Ex. 4-C; R. 44, 112). This press had not been used by the Company since the effective date of the labor agreement to the date of its removal (R. 48-49).

A fifth grievance (G. C. Ex. 4-D; R. 44, 113) concerned equipment which had only occasionally been used by employees classified as External Grinders doing slotting and grooving work (R. 49). No employees in this classification were laid off or reduced in classification during the term of the labor agreement (R. 49-50) and the type of work involved was still performed in the plant occasionally (obviously on other equipment) (R. 50).

The next grievance read, in part, (G. C. Ex. 4-E; R. 44, 114):

> "This grievance is being written in regard to the violation of the Company's action regarding the removal of the two (2) O.D. Grinding Machines on Thursday January 30, 1964 from the premises.
>
> "In our written contract with the Company we feel that the Company is obligated to meet with the Shop Committee of Local #310 and negotiate any and all machinery being removed, transferred, sold, loaned, rented, etc."

With respect to the classification of employees who worked on this equipment, the uncontroverted testimony was that there were *more* employees in this classification subsequent to the removal than there had been previously (R. 51), none

having been laid off or reduced subsequent to the removal (R. 52).

As to three other grievances, two (G. C. Ex. J and K; R. 44, 121-123) involved equipment which had not been used since the labor agreement went into effect (R. 53, 54), and one (G. C. Ex. 4-I; R. 44, 120) involved equipment that had not been used for several years (even prior to the effective date of the agreement) (R. 53).

Finally, one grievance (G. C. Ex. 4-H; R. 44, 119-120) challenged the removal of a piece of equipment, a chucker machine, *which had not been used for the 8 to 10 years prior to its removal* (R. 52)!

With respect to certain of these grievances, the Union asked the foreman of the department where the equipment had gone, and why. For example, with respect to the first grievance (G. C. 4-A; R. 44, 109), the Union Vice President testified (R. 64):

> "A. I asked Mr. Steelhammer if he would give me as a union representative the information that we felt was needed when we were aware of the fact that machinery was being moved out of the plant which without this information forthcoming we were unable to continue—or even originate the filing of a grievance."

And, in another case (R. 70):

> "A. I asked him for information which the union was seeking, the reason of the removal of these thread grinding machines and besides asking the reason I asked where they might be going."

However, it was uncontroverted in the record that in only one out of eleven cases did the Union ask the Company representative for any information concerning the equipment in the higher steps of the grievance procedure (R. 57). And, in that one case, the record discloses the following (R. 57):

"Q. They didn't ask you for the information?
"A. No sir.
"Q. Not at all?
"A. Only in connection with one grievance. They were joking with me about it and they said, 'Well, we know where it went anyway and what it is used for.'
"Q. They said that?
"A. Yes.
"Q. Who said that?
"A. Mr. Antalek and Mr. Rich."

Both Mr. Antalek and Mr. Rich testified at the hearing; neither denied the contents of this conversation with the Industrial Relations Manager.

One month after the last of the eleven grievances was filed, the Union wrote the Company the following letter (G. C. Ex. 5; R. 58, 124):

"The Union requests that the Company furnish the following information at the earliest possible date:

1. The approximate dates when each piece of equipment was moved out of the plant.
2. The place to which each piece of equipment was moved and whether such place is a facility which is operated or controlled by the Company.
3. The number of machines or equipment that was moved out of the plant.
4. What was the reason or purpose of moving the equipment out of the plant.
5. Is this equipment used for production elsewhere.

"The information we are asking for is essential to the Union for the servicing and administration of the current contract."

The Company replied (G. C. Ex. 6; R. 59, 125-126):

"We were unaware that our relationship with your union had reached the stage when correspondence such as your letter of April 3, 1964 has become necessary. However, while we are of the opinion that it is not the scope and complexities of our relationship that

dictates your use of this medium but, rather, that you are now attempting to build an unfair labor practice charge case, we shall, nevertheless, hereby respond.

"We presume that your questions relate to Article VI, Section 10 of our labor agreement, although you do not specify the relevance and/or utility of the questions. We note that this section establishes a right of transfer, with certain limitations, to employees '. . . who are subject to reduction in classification or layoff as a result of . . .' the movement of any equipment to another location of the Company. We also note that under Section 4 of Article IV of our labor agreement, grievances relating to layoffs must be filed within five (5) working days thereafter, and grievances relating to transfers must be filed within three (3) working days thereof.

"We are aware of no layoffs nor of any reductions in any classification within five (5) working days prior to your letter, and we, therefore, conclude that there is no proper basis upon which your request for information may lie. You have available all the information you need to determine whether or not any employees' rights are being violated. Furthermore, the broad scope of your questions is indicative of a fishing and harassment expedition rather than a true desire for necessary information.

"Please be assured that we shall continue to cooperate with your union in providing whatever proper informaton you request for your aid in servicing and administering our labor agreement."

Several weeks later the Union filed a refusal to bargain charge (R. 1), although the record is clear that even up to the date of the hearing, the Company had not refused to take any of the grievances to arbitration (R. 93).

Thereafter, a Complaint was issued alleging that (R. 5):

". . . Respondent has refused, and continues to refuse, to furnish to the Union data relating to the removal of equipment and machines from Respondent's plant, such information being necessary to the processing of

pending grievances and the administration of the existing collective bargaining agreement."

The Company moved to dismiss the Complaint (R. 11-15), but the motion was denied on the following basis (R. 16):

> "Upon consideration thereof, it appears from said pleadings that issues of fact are being raised which can properly be determined only in the light of evidence to be adduced at a hearing."

The hearing before the Trial Examiner took several tangents. At first, when the Company attempted to elicit testimony concerning the total lack of effect upon bargaining unit employees by the equipment removal, Counsel for the General Counsel (R. 45) and the Charging Party (R. 46) objected. The Trial Examiner overruled these early objections (R. 48):

> "Now, I might construe this contract to mean that if there were no employee affected by a layoff, no employee put in a reduced status, then the contract was not invoked, the contract clause was not invoked and that the information would not be required under the contract, not under Board law. That is why I want to get this information."

This position was apparently based upon his opinion expressed a few moments earlier (R. 47):

> "I am going to permit him to get in the evidence. That is my ruling, because I think there is a very serious question as to should this be before the Board."

However, the objections continued and the Trial Examiner began to change his position (R. 50):

> "Mr. Kovar: I have been interrupted constantly in an attempt to question this witness, this witness who incidentally was subpoenaed by the General Counsel, this witness who was called to the stand by the General Counsel, this witness who is at the present time the General Counsel's witness.
>
> "On cross-examination it seems to me that I am

allowed great latitude to this type of questioning. I have been asking or attempting to ask questions to this time concerning grievances which the General Counsel introduced in evidence. Why I must be subjected to this constant harassment is completely beyond me, sir.

"Trial Examiner: I am giving the General Counsel a standing objection. I have made my ruling on the proper examination. I have granted you the scope to cross-examine particularly on these grievance papers which were introduced by the General Counsel. However, the General Counsel has made no contention that any employees were laid off or were put in a reduced status as the result of the moving of any equipment. I think we are trying something that is not an issue in the case.

"Mr. Lazar: Exactly.

"Trial Examiner: This is my objection to it."

And, then finally, when the Company tried to prove that the Union knew that no employee had been affected by the machinery removal, the Trial Examiner reversed his position and upheld the objections (R. 77-78):

"Q. With respect to any one of the grievances introduced in evidence by General Counsel, can you tell me if any employee had been laid off within five days prior to the filing of any one of these grievances? And you take as much time as you wish to study them if that is required sir.

"A. Will you repeat that.

"Trial Examiner: I don't think that this is any allegation.

"Mr. Lazar: There is no such allegation. I don't think it is material or pertinent.

"Trial Examiner: Until the General Counsel alleges that someone was laid off within the five day period or even without it, I will sustain the objection, Mr. Kovar.

"Mr. Kovar: I think this testimony goes beyond that, Mr. Trial Examiner. I think this testimony goes to the fact that not only has there been no allegation

concerning layoff or reduction of classification, there is first hand information available to the union and therefore to the General Counsel concerning this matter and that the silence with respect to it now is not a matter that they don't know. It is a matter that there hasn't been any, Mr. Examiner.

"Trial Examiner: I am not interested in that. They haven't alleged any. That settles it. No. 8(a) (3) has been alleged.

"Mr. Kovar: It is not a question of that. I have a difficult time myself trying to figure out the theory upon which this case has been based but if we look at the contract, it seems to me that the information available to the union from which I am trying to get testimony concerning is sufficient for it to administer the contract and police the contract.

"Now, unless I can get such testimony in the record—

"Trial Examiner: You are not going to get testimony of this type into the record unless the General Counsel introduces testimony which relates to an allegation.

"The objection is sustained."

The Trial Examiner then maintained a consistent position, sustaining all objections to the Company's efforts to show the total irrelevance of the information requested (R. 81-83):

"Q. (By Mr. Kovar.) Does the union receive written notification of any employees or employee who is laid off?

"Mr. Lazar: Objection.

"Trial Examiner: Has this been answered already?

"Mr. Lazar: We have already decided that this is not an issue.

"Trial Examiner: I think we have. Thank you. Sustained.

"Mr. Kovar: I don't think it has been decided that this is not an issue, Mr. Trial Examiner.

"Trial Examiner: I would now rule that it is not an issue.

"Mr. Kovar: May I be heard before you rule, Mr. Trial Examiner?

"Trial Examiner: Yes, sir.

"Mr. Kovar: Under Article 6, Section 10 of the collective bargaining agreement, the parties have negotiated a provision which requires that where equipment is moved to another location of the company an employee who is then working in the plant who is subject to reduction in classification or is subject to layoff as a result thereof has certain rights.

"Trial Examiner: Yes, that is right.

"Mr. Kovar: If the union knows that there are no such employees as we have attempted to indicate is the fact through the testimony we have sought to introduce here, then it seems to me clear on the face that the additional information as to where equipment is moving is completely irrelevant to this contract, to the administration, to its enforcement.

"Now, unless I can get into the record clear testimony the fact that the union knows very well that no employee has been laid off as a result of removal of equipment and knows very well that no employee has been reduced in classification as a result of this, I have an open question at which point the General Counsel may argue, 'Well, we don't know whether anyone has been laid off or not, and therefore, it might be, this information might be relevant so why not give it.'

"So, facing that kind of argument, this is relevant.

"Trial Examiner: I will accept that kind of argument to the pleadings in this case. So I still consider this question irrelevant as to what is contained within the issues here which I construe is much more narrow than apparently the parties.

"This is a very narrow complaint. In effect you are anticipating allegations which have not been made. In other words, asserting an affirmative defense where there is no attack, where no attack has been placed by the General Counsel. I don't think that is necessary. The General Counsel has not made the direct allegation and submitted evidence in support thereof and there is no necessity for you to rebut it."

At the hearing, the Trial Examiner explained his final position as follows (R. 91-92):

"Trial Examiner: I don't think I need to hear from the General Counsel at this point. I am going to reject the offer of proof.

"In the first place, the contract of cause [sic] is binding upon the parties. Now the question of its construction and application is provided for in the grievance procedure. They go to arbitration. The only question before me is whether the union is entitled to other—is entitled to information under these. Granted, they waived all of these other claims or did not waive them, that is not an issue before me. There has only been a question of information which would enable them to intelligently administer the contract.

"I am a little disturbed in the fact that—not in this case but in so many other cases—where a collective bargaining agreement has been reached by the parties and thereafter they come running to the Board because they are disappointed in the agreement that they have signed.

"I tend to think this breaks down the entire machinery of collective bargaining.

"I am going to reject your offer of proof. In every case we can't go through all negotiations which led to a contract. I think it is partly the Board's own fault that they haven't discouraged this. I say, 'You have made your contract,' why don't you go where you belong with it. And I also under the Board's point being sustained by the Supreme Court that we have exclusive jurisdiction to cure unfair labor practices. You have to have a balance somewhere there between stabilization of contract and therefore the stabilization of the collective bargaining process and the curing or remedying of unfair labor practices.

"I reject that offer of proof. I have tried to confine this case much more closely than I have been able to. It not only breaks down the collective bargaining machinery, I don't see how it helps the peaceful settlement of dispute which the Act is supposed to encourage

for the Board to intervene where a contract has been made.

"That is all I have to say on this."

In his decision, in which he recommended the dismissal of the Complaint in its entirety, the Trial Examiner made no finding as to the relevance of any information requested (R. 23-25). He concluded (R. 24):

> "The parties have clearly stated that it should be submitted to arbitration and the Charging Party has, in effect, attempted to use the Board as a means to discovery and inspection in furtherance of its arbitration proceeding.[4] This is not, at least as I see it, a proper function of an agency already overburdened by its caseload. Overburdened, one might add, to a point where it may fail to serve as a functional apparatus for the prevention of unfair labor practices."

The Labor Board reversal of the Trial Examiner was based upon two findings: The first was that the information requested could be "related" to several provisions of the agreement (R. 28). Secondly, that the information sought was "necessary" to the Union in order for it to "evaluate intelligently the grievances filed. . . ." (R. 29.) There was *no* attempt to explain this finding of necessity.

The Court of Appeals for the Seventh Circuit reversal of the Board's decision noted that the Union's failure to follow the grievance and arbitration proceedings, to which the parties had agreed, appeared, in and of itself, to constitute a refusal to participate in the collective bargaining process. The Court went on to hold (R. 133):

> "Where the determination of the relevancy of information necessarily involves factors interrelated with or dependent upon construction of the substantive pro-

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4. "It would appear anomalous for the Board, which does not provide for discovery and inspection in its own proceedings, to serve as an instrument for such procedure in arbitration proceedings." (Footnote by the Trial Examiner.)

visions of the labor agreement, and those provisions are the bases of pending grievances already submitted under the grievance and arbitration procedures of the agreement Board intervention in the guise of determining and enforcing the peripheral matter of the duty to furnish information requested contributes nothing to any objective of the Act and in our opinion is improper. The order clashes with the policy of effectual achievement of contractual arbitration.

"The Board's order is set aside and its enforcement is denied."

SUMMARY OF ARGUMENT.

There has been an apparent assumption made by both the Board and the Union in this case that it should be treated as if it had occurred in a factual vacuum.

There have been pronouncements of principles; enunciations of premises; references to General Motors' practices (introduced for the first time in the proceeding before this Court); and scholastic theses as to the proper position of the Labor Board in the administration of collective bargaining agreements.

But there has been a total ignoring of the fact that this employer of approximately 100 employees was found guilty of violating the federal law because he refused to tell the Union where and why he sold one chucker machine—a machine that had not been used for eight to ten years![2]

This employer was found guilty of an unfair labor practice because he failed to inform the Union where and why a mill machine was removed—a machine last used several years before.[3]

This employer was found guilty of refusing to bargain in good faith because he refused to tell the Union where and why two jeweler's lathes were removed—when there were

2. See page 5, *supra* (G. C. Ex. 4-M; R. 44, 119-120, 52).
3. See page 5, *supra* (G. C. Ex. 4-I; R. 4, 120, 52-53).

the same number of jeweler's lathes after the removal as there had been before.[4]

An odious injustice has occurred where a small employer has been enveloped in the Labor Board's pell mell rush to enter into the field of labor contract administration. With all due respect we recall that "fools rush in where angels fear to tread,"[5] which is, we submit, particularly applicable in light of Professors Cox and Dunlop's statement that "undoubtedly the NLRB can never acquire the feeling of the experienced arbitrator or umpire for a particular situation."[6]

But be that as it may, the point remains that this employer has spent close to three years in defending himself against a charge of refusing to bargain because of the above described situations. In his behalf we must assume that "God's mill grinds slow, but sure,"[7] and we do here seek that this Court will uphold the Circuit Court's vindication of this employer.

We believe it cannot be a violation of Section 8(a)(5) to refuse to give information which is neither presumptively nor proven relevant and we are certain that the record of this case shows neither presumptive nor proven relevance. Thus, we submit that the facts of this case do not support the Board's position.

As to the question of law here involved, we believe that the Board has also erred.

The broad brush treatment of applying generalizations to the question of the Board's jurisdiction vis-a-vis labor arbitrations beclouds the real legal issues. The question here

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4. See pages 3, 4, *supra* (G. C. Ex. 4-B; R. 44, 111, 46-47).

5. Pope, "Essay on Criticism."

6. *Collective Bargaining During Contract,* 63 HARV. L. REV. 1097, 1132 (1950).

7. Herbert, George, "Jacula Prudentum."

involved is not whether the Board had jurisdiction to remedy an unfair labor practice which is also a contract violation, or even to remedy an unfair labor practice the existence of which is dependent upon a contract interpretation.

The basic legal question here involved is whether a refusal to bargain-violation can be found to exist where the charged party is attempting to rely upon the bargain the parties mutually reached. Can't the parties mutually agree to channel their bargaining relationship during the term of their agreement? How can it possibly be a refusal to bargain to rely upon the bargain previously reached? The General Counsel's attempt to issue judgment upon the propriety of the employer's contract reliance was properly challenged by the Trial Examiner in recommending that the Complaint in this case be dismissed in its entirety. He stated (R. 25):

> "... We are approaching a point where an employer may well wonder if he has anything to gain by engaging in collective bargaining if any disaffection with the operation of the contract on the part of contracting union may be taken to review by the Board under Section 8(a)(5)."

We submit that once the parties have made a contract, that thereafter the bargaining obligation is governed by the parties' bargain. This principle, properly applied, would deny any finding of an unlawful refusal to bargain where the accused was relying upon his bargain, his labor contract.

The Board is attempting to use this information case, and the companion case *C & C Plywood* case (No. 53), as a means of pushing itself into the day-to-day established relationships of employers and unions, as a means of declaring itself to be a proper administrator of the parties' labor agreements. Neither of these cases involve an "incursion into the Board's statutory authority" (Pet. Br.

p. 8), but, rather, they involve the Board's invasion of the parties' contractual relationship.

This foray must be recognized for what it is, and must be repulsed if the American industrial society is to continue to grow, is to continue to improve the economic well-being of our nation.

ARGUMENT.

I. THE INFORMATION HEREIN SOUGHT WAS NEITHER PRESUMPTIVELY NOR PROVEN RELEVANT.

In their briefs, both the Board and the Union aver that no question exists concerning the relevance of the information here involved. In all of their argument, this point is assumed. In their haste to formalize *per se* rules of refusals to bargain, both the Board and the Union have, ever since the filing of the charge, ignored the factual situation here involved.

Whether we speak in terms of relevance, or importance, or necessity, a key *factual* question must remain whether or not the refusal to give the information requested constituted an unfair labor practice—a refusal to bargain.

At the hearing, both the Union and the counsel for the General Counsel made it clear that they were unconcerned with whether or not the equipment removal had any employee affect, or whether or not in fact any contract violation were involved.[8] Their apparent assumption was that

8. For example (R. 45):

"Q. (By Mr. Kovar.) Mr. Bellush, with respect to General Counsel's Exhibit No. 4-A which is grievance No. 54, this grievance has to do with the alleged removal of a Kleerman Machine?

"A. Yes.

"Q. Employees in what department utilized that machine prior to April of 1963?

"A. Tool Room employees.

"Mr. Lazar: Objection, Mr. Trial Examiner, I don't know what materiality it has at this point."

See also transcript of proceedings p. 23 (R. 46).

For another example (R. 77):

"Q. As a union representative, are you aware that the company gives written notice to the union of every employee who is laid off? Are you aware of that?

"A. Yes, I am.

the information was necessary for the Union to determine if a contract violation had taken place, because the information *might* be related to the contract. And it was this position which the Board itself obviously accepted (R. 29).

Let us take a look at the facts of the case and determine if any of the information requested was necessary to "evaluate intelligently the grievances filed" (Bd. Dec., R. 29). Let us review the questions asked by the Union (G.C. Ex. 5; R. 124). And, in reviewing each question, keep well in mind that most of this equipment had not been used for years; some had been replaced by other; that the work on some could still be, and was, done on remaining equipment; that in no case was any employee laid off or downgraded as a result of the removal.

The first piece of information sought was "The approximate dates when each piece of equipment was moved out of the plant." It is quite apparent that the pieces of equipment referred to, not otherwise ever being identified, must have been those pieces of equipment identified in the eleven grievances.[9] But, the Company answered the first

"Q. Are you aware that the company gives written notice of any employee who is reduced in classification?

"A. I am.

"Q. With respect to anyone of the grievances introduced in evidence by General Counsel, can you tell me if any employee had been laid off within five days prior to the filing of anyone of these grievances? And you take as much time as you wish to study them if that is required sir.

"A. Will you repeat that?

"Trial Examiner: I don't think that this is any allegation.

"Mr. Lazar: There is no such allegation. I don't think it is material or pertinent."

9. This is further apparent from the Union President's testimony at the hearing (R. 81):

"Q. Now, why did you seek the information that you asked for in that letter?

"A. Well, sir, we felt that unless the company was willing to supply the information that we had requested in this letter we would not be able to administrate the various articles and sections of the contract and also properly process grievances which at that time were pending.

grievance specifically telling the Union when the equipment had been removed (G. C. Ex. 4-A; R. 109-110), and in four others, the grievance itself specified the date (G. C. Exs. 4-D, 4-E, 4-F and 4-G). In light of these facts, can it be said that the refusal to answer this question was a refusal to bargain in good faith, that the Union needed this information to evaluate intelligently the grievances filed?

The third question asked for the "number of machines or equipment that was [sic] moved out of the plant." In view of the fact that the equipment was already identified as to kind and number in the grievances, can it be said that it was a refusal to bargain in good faith to answer this question?

The fourth question asked for the employer's motives in moving the equipment. It would seem obvious on its face that the refusal to answer this should not constitute a refusal to bargain. In the case of a piece of equipment unused for eight prior years, the question might well be considered an insult. In any event, the employer's motivation would have no bearing as to whether the contract were being violated.

The second and the fifth questions related to where the equipment was destined and for what was it being used. These two questions would appear to bear on the parties' contract; in the words of the Board they "can be related

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"Mr. Lazar: I have no further questions.

"Cross Examination.

"Q. (By Mr. Kovar.) Which grievances couldn't you process, Mr. Antalek?

"A. The grievances pertaining to the removal of the machinery, grievances pertaining to the farming out of work, grievances pertaining to people on layoff.

"Q. Can you identify a little more closely as to what grievance you are talking about?

"Trial Examiner: Are these the grievances which have been placed in evidence that you are referring to and filed in the grievance procedure?

"The Witness: Yes, sir."

to either Article I, Section 3, or Article VI, Section 10 of the Agreement." (R. 28.) But the question is not whether they have some *relation* to those sections of the Agreement, the question is whether the refusal to answer them constitutes a refusal to bargain. As this Court pointed out in the *Truitt* case,[10]

> "The inquiry must always be whether or not under the circumstances of the particular case the statutory objective to bargain in good faith has been met."

One section of the contract (Article VI, Section 10), specifically involved removal of equipment to another location of the Company. It read (G. C. Ex. 3; R. 41, 102):

> "Section 10. In the event the equipment of the plant or of any department, entirely or partially, is hereafter moved to another location of the Company, employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement covering production and maintenance employees at such location."

Knowing that no employees had been laid off or reduced in classification as a result of any equipment removed, and, more importantly, knowing that the Union knew this fact, is it small wonder that the employer considered the questions as they might have related to this contract section to be harassment, not necessary to the Union's function?[11] The only possible violation of this contract section would be the Company's refusal to allow employees laid off or downgraded as a result of equipment removal to follow the equipment. *If* there were such employees, then the Union would need to know where the equipment went and,

10. *NLRB* v. *Truitt Mfg. Co.*, 351 U. S. 149, 153-154 (1956).

11. That the Union knew that no employees had been laid off or downgraded as a result of the removals is without question.

if it were a Company location, whether or not there was a labor contract in effect at such location. But, *knowing that no employee was laid off or downgraded as a result thereof (which information the Union had),* the Union needed no further information to evaluate intelligently a possible violation of this section.

Furthermore, the employer knew from reading the grievances that the Union was taking a position that "In our written contract with the Company, we feel that the Company is obligated to meet with the Shop Committee of Local #310 and negotiate any and all machinery being removed, transferred, sold, loaned, rented, etc." (G. C. Ex. 4-E, R. 44, 114.) The employer had already negotiated such matters with the Union, and had agreed that it would incur certain obligations to employees affected by equipment removals under certain circumstances. Small wonder again, that the employer resisted the Union's demand to re-engage in negotiations during the term of their bargain.

The other section of the contract (Article I, Section 3) to which the Board says the information might have been related read as follows (G. C. Ex. 3; R. 41, 102):

> "Section 3. It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company. The Company will continue to purchase components and sub-assemblies and to have other outside work done, including the making of tools and dies, where it is not economic to perform this work in the plant, or where production schedules, equipment, employee skills or other factors make it impractical to perform the work in the plant. Violation of the above will be subject to the grievance procedure."

It may be interesting to speculate on the method of reasoning as to what work might be "normally performed by

employees'' on equipment that had been unused for years. But the simple exposé of the lack of relation of the question to this section is that an employer is in no position to say what a third party might be doing with the employer's former equipment. As pointed out in *NLRB* v. *United Brass Works, Inc.*, 287 F. 2d 689, 697 (4th Cir. 1961):

> "We need cite no authority for the proposition that an employer need not be required to accede to a request to furnish information which it did not possess."

Further, there is no direct relationship between subcontracting and an employer's former equipment. Assume, for a moment, that the Company were to have answered the Union's questions herein insofar as they were within the knowledge of the Company.

If the Company had answered that some equipment went to a third party, would that necessarily mean that any subcontracting was taking place? Of course not. If the Company replied that no equipment went to a third party, would that mean that no subcontracting was taking place? Again, of course not. In any event, would it be any more or any less of a contract violation if subcontracting were taking place utilizing equipment formerly owned by the employer? If the Union were really interested in evaluating intelligently a possible violation of Section 3, why didn't it ask whether any subcontracting was taking place?

We note that the Board has given us an opportunity of viewing the type of labor contract interpretation we might expect from it were that to become grist for its mill. It interprets these two contract provisions as follows (Pet. Br. p. 18):

> "Article I, Section 3, and Article VI, Section 10 (R. 96, 102) make it a violation of the contract for the respondent to move machinery either to a subcontractor or to another plant owned by respondent where such movement would deprive employees covered by

the agreement of any work. As we understand its position, respondent does not argue—nor could it tenably so argue under the plain contractual language—that such movements of machinery are left to its unilateral control under these provisions. . . ."

We not only could argue, but we would argue, that under this contract, the movement of machinery is left to the employer's unilateral control: the employer decides *if* the machinery is to be moved; he decides *when* it is to be moved; he decides *where* it is to be moved. Those unilateral decision may give rise to certain contractual obligations, but only if (1) employees then working are affected by the movement and (2) there is no union contract at the new location.

Last, but far from least, the relevancy and importance of all of these questions must be viewed in light of the uncontradicted evidence that only with respect to one grievance did the Union ever ask for any of the information after the grievances were filed. And that one instance took the following course (R. 57):

"Q. They didn't ask you for the information?
"A. No, sir.
"Q. Not at all?
"A. Only in connection with one grievance. They were joking with me about it and they said, 'Well, we know where it went anyway and what it is used for.'
"Q. They said that?
"A. Yes."

It is mandatory upon an administrative agency to proffer to a reviewing court not only its decision and order, but its specific findings as well as "the reasons or basis therefor" Section 8(b) of the Administrative Procedure Act, 5 U. S. C. § 1007(b). The Board's assumption of relevance and/or necessity in order to use this case for a springboard to new and all-inclusive statements of law is similar to the type of agency decision denounced by the Court of

Appeals in *In Re United Corporation*, 249 F. 2d 168, 179, 181 (3d Cir. 1957):

> "... it is a generalization which is a great deal wider than that which could be based on the facts specifically found. The parties concerned are entitled to have the reviewing tribunal have something more explicit than this type of generalization.
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> • • • • •
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> "... A bare conclusion is insufficient even when prefaced by a statement that it was reached after careful consideration of all the evidence, as here. Strikingly applicable here is the much quoted statement of Justice Cardozo that 'we must know what a decision means before the duty becomes ours to say whether it is right or wrong.' "[12]

We submit that there is no precedent, no logic, no reason whatsoever why information of the type here sought, under the conditions here sought, must be given a union under pain of being found guilty of a refusal to bargain. We submit that had the Board been less intense in its desire to formulate a *per se* rule of finding a refusal to bargain, it would have long ago dismissed the Complaint in this case.

If relevance of information is required, then this employer should once and for all be freed of the charge of refusing to bargain. The General Counsel never attempted to prove such relevance;[13] the record does not substantiate such a finding.[14]

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12. *U. S.* v. *Chicago M. S. P. & Pac. R. Co.*, 294 U. S. 499, 511 (1935).

13. "The General Counsel has the burden of proving an unfair labor practice by a preponderance of the evidence." *NLRB* v. *Council Mfg. Corp.*, 334 F. 2d 161, 163-164 (8th Cir. 1964) and cases cited therein.

14. "Congress has . . . made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes . . ." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488 (1951).

For this reason alone, the decision of the Court below should be affirmed.

II. A PARTY'S INSISTENCE THAT ITS COLLECTIVE BARGAINING AGREEMENT BE HONORED CANNOT AND SHOULD NOT CONSTITUTE A REFUSAL TO BARGAIN.

In recommending dismissal of the Complaint in this matter, the Trial Examiner found that the intervention of the Board in this type of case contributed nothing to industrial harmony and intimated that such intervention might have just the opposite result (R. 25).

> "We are approaching a point where an employer may well wonder if he has anything to gain by engaging in collective bargaining if any disaffection with the operation of the contract on the part of contracting union may be taken to review by the Board under Section 8(a) (5)."

The Court below implemented the Trial Examiner's misgivings by stating that enforcement of the Board's Order would "contravene the national [labor] policy" (R. 133). And also noted that the Union's "recourse to the Board under such circumstances as are presented appears to constitute a refusal to participate in the continued collective bargaining process afforded by the grievance and arbitration procedures prescribed" (R. 133).

We submit that both the Trial Examiner and the Circuit Court found themselves in a legal quandary which only this Court can resolve. Both were plagued with the confusion as to what constitutes good faith bargaining during the term of an agreed upon bargain. While the Trial Examiner viewed the matter as one for the discretion of the Board, the Circuit Court apparently felt, properly we believe, that the matter is one for the judiciary, this Court ultimately, to decide. The legal question is simply this: What is the obligation to bargain during the term of the bargain?

While in our opinion this case was not the proper vehicle for reaching this state of legal review, the fact remains that the question has been presented to the Court in this case, so let us commence.

In attempting to delineate the nature, scope and objective of the obligation imposed upon employers and unions during the period of their agreement, it is first necessary to set forth what is *not* included in this review. First, the apparent inconsistency between Sections 10(a)[15] and 203 (d)[16] of the Act are not here involved. For Section 10(a) to have any application, an unfair labor practice must be involved; it obviously is of no import where no unfair labor practice has been committed. We must, therefore, cross the threshold legal question (What is the obligation to bargain during the term of the bargain?) before we get to Section 10(a). And we need never get to Section 10(a) with the attendant problems of concurrent, primary, or exclusive Board jurisdiction, if it is determined that no unfair labor practice exists in the circumstances here involved.

Second, we need not be concerned with the Board's jurisdiction vis-a-vis an arbitrator, the courts, or anyone else. It may well be that in a discrimination case arising under Section 8(a)(3) or in any unfair labor practice case *other*

15. "Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ." (49 Stat. 453, as amended, 29 U. S. C. § 160(a)).

16. "(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases." (61 Stat. 153, 29 U. S. C. § 173(d)).

than a refusal to bargain, the Board may have exclusive or concurrent jurisdiction with another tribunal.[17]

Third, and finally, we are not here concerned with the Board's authority or lack thereof to interpret a labor agreement under any and all circumstances. It may well be true as the Board argues in its briefs in this case, and the companion case, that it may be necessary in cases *other* than refusal to bargain cases for the Board to construe a labor agreement.[18]

The instant case concerns none of these issues. The issue is what constitutes good faith bargaining during the term of the bargain. Can employers and labor organizations by their agreement define the scope and nature of bargaining during the term of the agreement?

It is submitted that where the parties have bargained, they should have the right to determine which subjects, *if any*, they will continue to bargain about during the contract term, and they should have the right to determine how that bargaining will take place.

The underlying premise which the Board has taken in the instant case, as well as the companion case, is that the agreement does not vary the parties' duty to bargain as that duty existed before agreement was reached. In so doing, the Board has inverted collective bargaining, as that term is understood in the United States, from being a "process" toward an ultimate goal to the status of the ultimate goal.

In *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332, 342 (1939), this Court stated ". . . the purpose of the statute was to

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17. *E.g.*, concurrent jurisdiction has been upheld in a discriminatory discharge case in *Smith* v. *Evening News Ass'n.*, 371 U. S. 195 (1962).

18. This function apparently has been expressly entrusted to the Board insofar as an agreement may contain an unlawful union security clause or "hot cargo" provision.

compel employers to bargain collectively with their employees *to the end that . . . contracts binding on both parties should be made.*" This objective was not changed by the amendments to the original Wagner Act contained in the Labor Management Relations Act of 1947. As this Court noted in *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 578 (1960) ". . . The present federal policy is to promote industrial stabilization through the collective bargaining agreement."

It would appear senseless, as the Trial Examiner noted, for an agreement to be reached if the parties thereto could not later rely upon it as the determination of their rights and obligations. The very antithesis of the "refusal to bargain" exists where one party refuses to deviate from the terms of the agreement to "bargain" on another basis.

We submit that the general proposition of law which this Court should enunciate is this:

> The duty to bargain in good faith during the term of a labor agreement is the adherence to and reliance upon the substantive and procedural provisions of that agreement.

The necessary corollary to this proposition is:

> A party's insistence that its collective bargaining agreement be honored cannot constitute a refusal to bargain.

This proposition is based upon the simple proposition that where parties, pursuant to their obligation to bargain, come to an agreement, they should be able (and obligated) to rely upon it. In *Textile Workers Union* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 453 (1957), this Court examined the legislative history of the Taft-Hartley amendments of 1947 and concluded that both houses of Congress "indicate a primary concern that unions as well as employees should be bound to collective bargaining contracts." Again in

Charles Dowd Box Co., Inc. v. *Courtney*, 368 U. S. 502 (1962), this Court spoke of the realization of industrial peace through "refinement" of the bargaining process and concluded ". . . such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored."

Insofar as this requisite "honor" is directed to substantive issues contained in the parties' agreement, the words of the Court of Appeals for the Eighth Circuit have never been subject to judicial doubt:

> "The respondent, we think, may not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective bargaining agreement with them called for."[19]

Nor is there any reason why this principle of reliance should not apply equally to the *procedure* for bargaining, as well as to the *substance* agreed upon by the parties. To the contrary, the procedural primacy of a labor agreement is what was specifically called for by Congress,[20] in Section 203(d) of the Act.

Thus, in *NLRB* v. *Knight Morley Corp.*, 251 F. 2d 753 (6th Cir. 1958), the court, relying on this Court's decision in *Lincoln Mills* stated: ". . . the duty to bargain could be directed by the parties through contractual agreement . . ." and held that the employer's refusal to bargain except through those procedures could not thus be an unfair labor practice. See also, *NLRB* v. *Standard Oil Company*, 196 F. 2d 892, 895 (6th Cir. 1952).

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19. *NLRB* v. *Nash-Finch Co.*, 211 F. 2d 622, 627 (8th Cir. 1954).

20. "Once the parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." House Com. Rep. No. 510 on H. R. 3020, I Legis. Hist. LMRA 545-546 (1947).

The express establishment of this rule of law will, to be sure, most immediately affect the Board's use of the "unilateral change" rationale to participate in the parties' contractual relationship. For example, the Board could not, as it has in the *C & C Plywood Corp.* case (No. 53), declare that the employer's action in changing to a group incentive plan in reliance on the terms of the applicable agreement was a refusal to bargain because the Board's interpretation of the agreement differed from the employer's.

The Board has attempted to circumvent the bargaining primacy of the labor agreement by declaring that the statutory obligation to bargain continues on throughout the term of the bargain, abated *only* to the extent specifically required by the terms of the agreement.

But this Board position assumes that the parties normally bargain to an incomplete bargain; that their final agreement is not final. This assumption ignores the fact that ". . . it has generally been accepted throughout the United States that management's rights not specifically surrendered in a collective bargaining agreement are reserved to management."[21]

Arbitrator Dworkin expressed this principle almost fifteen years ago as follows:

> ". . . Notwithstanding the absence in the contract of a definite management prerogative clause, the arbitrator believes that the company nevertheless retains the exclusive right to manage the business and plant and to direct the working forces, provided, however, that in the exercise of its right, the company is required to observe the provisions of the agreement. The right to manage the business and plant and to direct the working forces include the right to hire, suspend or discharge for proper cause, to transfer, or

21. Arbitrator Wayne Quinlan, *Phillips Petroleum Co.*, 33 Lab. Arb. 379, 384 (1959).

to lay off employees because of lack of work, or for other legitimate reasons. The union reserves the right to use the procedure of the grievance provisions of the agreement if it questions the company's action respecting discharge, discipline, transfer or lay off of any employee. In accordance with well established practice, owners of business establishments possess certain freedoms of action, incidental to their very existence, which has been interpreted as including 'those rights, or that authority which management must have in order to successfully carry out its function of managing the enterprise.' (Hill & Hook, Management at the Bargaining Table, 56 (1945)).'"[22]

Arbitrator Klamon put the matter this way:

"Management has certain inherent rights to operate a plant as efficiently as it can. Even if this right is not reserved and spelled out in broad general terms, it is inherent in business and would be recognized by everyone. It is a residual power somewhat comparable to the inherent police power of the state to make all laws necessary for the safety and welfare of citizens. The only limitations upon it are those which Management itself relinquishes in labor contracts. Such limitations as Management accepts and agrees to necessarily can go no farther than specifically and clearly spelled out. All other inherent powers of management necessarily remain unimpaired."[23]

This rule of construction, which employers and unions have recognized over the years, is that the execution of the labor agreement concludes collective bargaining as that concept is recognized prior to a contract, and funnels the bargaining relationship into a contractual relationship. This does not mean that the bargaining relationship goes into limbo; it does mean that the bargaining responsibilities of the parties are determined by the contract, not by pre-contract principles. Thus, in *Timken Roller Bearing Co.*

22. *William Brooks Shoe Co.*, 19 Lab. Arb. 65, 70 (1952).
23. *Union Starch Refining Co.*, 15 Lab. Arb. 782, 789 (1950).

v. *NLRB*, 161 F. 2d 949, 955 (1947), the Board's attempt to impose its bargaining-over-contract theory was rejected, the Sixth Circuit Court of Appeals stated quite succinctly:

> "Though the duty to bargain is absolute, it may be channeled and directed by contractual agreement."

Once the labor contract is signed, it must be presumed that the collective bargaining guaranteed by the Act has been completed, and all of its results are embodied in the agreement *per se* as a whole. No further collective bargaining rights lying beyond or outside of the specific terms of the contract can be asserted into existence. It must be presumed that whatever matters are not reduced to specific contract provisions in the course of the parties' negotiations of the contract itself are left to the action of management. The exception to this, of course, is when the parties mutually agree to continue negotiations over specific items of general areas and, hence, specifically provide therein for further negotiations during the contract's term for such items.

This "residual rights" doctrine is no abstract theory; it is a living, practical concept required by the facts of industrial life. The rationale was explained close to twenty years ago, as follows:

> "Management is charged with carrying out many policies. One of these policies is contained in the contract with the union. Therefore, it becomes management's job to manage the plant under this contractual policy. The management is always the 'acting' party; there is no basis for the idea that, because a labor contract exists, the union shares jointly the obligation to manage the plant efficiently. That is solely management's obligation.
>
> "Many uninitiated observers of the labor union movement believed that as unions matured they could take on a joint function with management in running the

everyday affairs in a plant. The fallacy in any such arrangement is revealed very directly by William Leiserson, formerly a member of the National Labor Relations Board and the Railroad Mediation Board, who said of the ill-fated attempt to administer the Office of Production Management under the dual leadership of Knudsen and Hillman:

"'. . . The President was asked what would happen if they disagree. He answered they would work together and make joint decisions. This was taken as an indication that the government intended the business of defense production to be a joint co-operative enterprise of employers and workers on an equal partnership basis. . . .There developed a confused organization and administration. . . . The arrangement had to be discarded. . . .

"'In retrospect it is easy to see the mistake that was made in establishing the double-headed directorship of the Office of Production Management. It was due to inadequate analysis of the job that was to be done and failure to distinguish functions. We do not have to be versed in the philosophy of management to understand that it is not practical to mix the policy-making functions of an organization with the operating functions.

"'It does not work and it satisfied no one. It leads to maneuvering and argument. It leads to maneuvering and argument about policy among operating officials whose sole duty should be to carry out promptly and efficiently the operating orders. . . . It turns a production organization into a debating society.'

"The basic principles which are to guide the company in its labor relations are established in the union contract. Collective bargaining takes place when the basic policies are hammered out. From that point on, management must manage or the plant managers, instead of managing, become debaters in a debating society.'"[24]

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24. Fairweather and Shaw, *Minimizing Disputes in Labor Contract Negotiations*, LAW AND CONTEMPORARY PROB., 308 (Duke Univ. 1947).

In the companion case, *C & C Plywood*, the Board has urged (at pp. 27-29 of its brief therein) that the residual rights theory is inconsistent with the Board's theory that a waiver of bargaining must be express and clear. We agree. But, we submit, it is not the rest of the American industrial complex which is out of step, it is the Board which is out of step.

The Board's position might well be contrasted with this Court's remarks in the *Warrior & Gulf* case:[25]

> "Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. . . . A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes. . . ."

The Board's subjugation of the parties' agreement is based, we believe, upon an undue concentration upon the pre-contract nature of the duty to bargain and a failure to recognize that the duty may well, and should, take a different form after the parties reach their agreement.

As pointed out by this Court:

> "... The Board has not been commissioned to effectuate the policies of the Labor Relations Act so single mindedly that it may wholly ignore other and equally important Congressional objectives."[26]

This admonition is no less applicable to a situation where, as here, the Board's vision has been restricted to a single facet of the Labor Act's objectives.

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25. 363 U. S. 574, 583 (1960).

26. *Southern SS Co.* v. *NLRB*, 316 U. S. 31, 47 (1941).

The proposition of law here propounded assumes that the parties impliedly—even if not expressly—consider their collective bargaining agreement to be a total agreement.[27] The Board's contrary assumption reveals, we submit, the Board's lack of expertise in the interpretation of labor agreements. We would, of course, agree with Professor Bernard Dunau's statement:

> "The NLRB has no special expertise in the interpretation of the substantive provisions of a collective bargaining agreement. . . ."[28]

There is another reason why the Board should stay out of labor contract administration. The Board is a governmental agency, representing and protecting the public interest. Its invasion with what is at the time a private, contractual relationship constitutes an unjustified inconsistency with its basic purpose. In the *Sinclair* case, the court noted this:

> "But if the Union may, as it has done here, call upon an outside agency as the weapon for discovery of information which, on one of the alternative constructions of the contract, will be completely superfluous, the whole proceeding is necessarily disrupted. The arbiters cannot continue. The whole controversy then shifts from the plant to the nearest Board hearing room, and thereafter to the nation's capital, and then on to the seat of any one of the eleven Courts of Appeals having geographical jurisdiction over the employer. Whatever else that is, it is not giving full play to the means established by the parties. More than lost time, it introduces or magnifies advocative

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27. Just as in the present case the parties included in their contract the following language (G. C. Ex. 3; R. 107):

> "Section 1. This Agreement supersedes and cancels all previous agreements between the parties and constitutes the entire agreement between the parties, concluding bargaining for its term."

28. Dunau, *Contractual Prohibitions of Unfair Labor Practices: Jurisdiction Problems*, 57 COL. L. REV. 52 (1957).

> hostility. For now a new adversary has entered the lists—the General Counsel who, from the nature of the complaint, aligns himself with one of the adversaries—the Union—but who as a sort of protector of the general public interest must advance his advocacy, pro and con, not in the manner best calculated to bring an end to the dispute, but in a manner thought, from that lofty vantage, to be best for the general good. Even worse, that diversion ends in a decision which, if it determines the substantive issue adversely to the Employer as does this one leaves the Employer facing an additional adversary—the Board. This makes it necessary for the Employer to resist that determination in order to get the matter back where it started—in the laps of the arbitrators. To do that the Employer must come to court. But the courthouse, says the Supreme Court, is not the place to work out industrial disputes when arbitration has been prescribed and is available.'"[29]

The other side of this coin was noted by Arbitrator Saul Wallen, a former President of the National Academy of Arbitrators:

> "The arbitrators who decide the majority of cases presented to arbitration in this country, the ones who . . . are called back time and again to serve have met a test no judge is ever called upon to meet—the test of the market place, the judgment of those in a position to contract frequently for their services."[30]

The Board cannot claim the same sort of realistic objectivity as the professional arbitrator.

Finally, as the Trial Examiner noted (R. 24), the Board is already overburdened. This Court may take judicial notice of the growing number of full time, professional labor arbitrators in this country. If the Board is to place

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29. *Sinclair Refining Company* v. *NLRB*, 306 F. 2d 569, 579 (5th Cir. 1962).

30. The Southwestern Legal Foundation, Proceedings of the 12th Ann. Inst. on Labor Law, to be published.

itself into the arbitration function, the resulting delay in the administration of labor agreements could well be catastrophic.[31]

III. THE REFUSAL TO GIVE CONTRACT INFORMATION CANNOT CONSTITUTE A REFUSAL TO BARGAIN.

Assuming for the moment that the information here sought was in fact "related" to the parties' labor agreement, the refusal to give such information nevertheless could not constitute a refusal to bargain.

If the term "related" connotes nothing more than some sort of connection, then the Board would be declaring it to be a refusal to bargain to refuse to furnish any information which has some connection to a contract term. To but state the possibility is to reveal the impropriety.

If the term "related", however, connotes actual relevance to a contract provision, then the determination of that relevance is a matter for the parties' agreed upon procedure to determine and the general proposition set forth in Point II, *supra,* obtains.

We believe that the question of an employer's statutory duty to provide a union with information has been inundated with too many generalizations in thinking and discussion.

The cases first arose involving wage and related data. It was easy to see the relevance of such information, and the decisions uniformly so held. But the language and the reasoning therein noted should be carefully reviewed for as the court in the *Sinclair Refining* case noted:

"Now we must regard § 8(a)(5) data-producing-order in the light of the pervasive policy to encourage the

31. One need only look as far as this case to see that if the union had seriously believed that employees were adversely affected by the Company's actions, it would have left those employees without relief for almost three years.

fullest use of the machinery established by the parties for the resolution of disputes arising under the collective bargaining contract."

We submit that relevant information which is ". . . *directly related* to the Union's function as a bargaining representative"[32] may be required of an employer, *unless* the employer proves that under the particular circumstances, the refusal is not a refusal to bargain in good faith.

For example, if a union demanded certain wage data (of which relevance is presumed), and the employer showed (a) he had previously given substantially similar data, or (b) that the union had specifically waived the right to the particular data, or (c) the employer did not have the specific data requested, or (d) the data requested was far too voluminous for the employer to compile at its own cost, should an 8(a)(5) violation be found? We think not.

Further, we submit that information, the relevance of which depends *solely* upon the the existence of a labor agreement, is not and cannot, as a matter of law, be directly related to the Union's function as a bargaining representative. There is an intervening factor negating the requisite direct relationship, and that factor is the labor agreement. If the information sought is *directly related* to the bargaining function without recourse to the parties' agreement, that is one situation. But if its relation to the union's bargaining function is dependent upon, or arises out of the labor agreement, it is not *directly* related to the union's bargaining function.

Indeed one of the authors cited and quoted by the Board in its brief (p. 23) concluded as follows:

"Certainly the case for Board deference is not insubstantial. So long as the union demand for the information is based on its asserted relevance to a griev-

32. *J. I. Case Co.* v. *NLRB*, 253 F. 2d 149, 155 (7th Cir. 1958).

ance, the primary question is one of contract construction. Indeed, it is apparently not disputed that the withholding of information cannot be deemed a violation unless there has been an adjudication somewhere of the incorrectness of the company's interpretation of the contract." (Lesnick, Arbitration as a Limit on the Discretion of Management, Union and NLRB, Proceedings of New York University Eighteenth Annual Conference on Labor, 7, 27-28 (BNA 1966)).

This Court's decision in the *Woolworth* case[33] does not conflict with this principle. In that case, the Union's request concerned wage data—a matter having an obvious, direct and intrinsic bearing upon the employer-employee relationship. A matter, it should be noted, which quite obviously did not rely for its relevance on the existence of a labor agreement or the proper construction thereof. The same inherent relevance attached to the information requested in all other Court cases cited by the Board in its brief.

Thus, in the *Timken* case[34] the Court of Appeals specifically noted at the outset of its opinion that it was a "wage data case." Furthermore, no issue of contract construction of the underlying subject matter was noted; the Employer therein merely contending that relevant information should be obtained through arbitration, not voluntarily submitted during the grievance procedure. The Court did note that if the determination of "relevance" was dependent upon the construction of the parties' agreement, the parties' channeling of the method of such bargaining would necessarily control.

A similar fact situation was presented to the Court of Appeals in *Fafnir Bearing Co.* v. *NLRB*, 62 LRRM 2415 (2d Cir. 1966). There the Union requested information

33. *NLRB* v. *F. W. Woolworth Co.*, 352 U. S. 938 (1956).

34. *Timken Roller Bearing Company* v. *NLRB*, 325 F. 2d 746 (6th Cir. 1963); cert. denied 376 U. S. 971 (1964).

with respect to the computation of incentive rates. Similar facts were ordered to be made available in *J. I. Case Co.* v. *NLRB*, 253 F. 2d 149 (7th Cir. 1958).

The recent decision of the Third Circuit in *Curtiss-Wright Aero Div.* v. *NLRB*, 347 F. 2d 61 (1965) did not concern wage data; it is, however, similar to all other cases cited by the Board inasmuch as it concerned the Employer's attempt to take employees out of the bargaining unit—a matter not dependent upon a construction of the Agreement for its relevance to the bargaining relationship.

The *Sinclair*[35] and the *Square D*[36] cases recognized the contract dependence nature of the information sought and refused to uphold the Board's gratuitous attempt at arbitration. These decisions, it might be noted, are in obvious accord with this Court's statement in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*: ". . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction that was bargained for."[37]

If the Board's position were to prevail, i.e., that any information related to a contract must be furnished upon request, the distinction between mandatory and permissive subjects of bargaining becomes unclear. For example, can it be said that the removal of equipment (antiquated, unused, etc.), is a mandatory subject for bargaining without regard to its effect on employees? We believe the answer is obviously no. Yet here, the Board is saying that a refusal to furnish information concerning such is a refusal to bargain: A strange—and unnecessary—result indeed.

The Board's attempt to "relate" information to the contract prior to a determination of the contract by the

35. *Sinclair Refining Company* v. *NLRB*, *supra* n. 29.
36. *Square D Company* v. *NLRB*, 332 F. 2d 360 (9th Cir. 1964).
37. 363 U. S. 593, at 599 (1960).

arbitrator is also at crossed swords with this Court's view of the meaning of a collective bargaining agreement. It is beyond Respondent's comprehension how the Board could find a contractual provision upon which to hang the relationship when "the processing of disputes through the grievance machinery is actually a vehicle by which *meaning and content* are given to the . . . agreement."[38]

The Board's attempt to relegate the *Sinclair* and *Square D* decisions to questions of "grievability" rather than substantive construction ignores the clear wording in both decisions that the underlying issue was arbitrable. Needless to say, an arbitrable issue is perforce "grievable" whatever that term might suggest.

Nor should the Board legitimately concern itself, as it apparently has in its brief, with fears that reliance upon arbitration is a last resort, frustrating the efficient handling of grievances through the lower steps of the procedure. This Court has already declared that labor arbitration is neither a substitute for litigation nor a process to be invoked only if "there has been a breakdown in the working relationship."[39]

Similarly, the Board's doubts that an arbitrator may not possess sufficient authority to compel production of information which is in fact relevant to the proceeding before him are unfounded. The failure of the proposed United States Arbitration Act to include broad subpoena power, as noted in the Board's brief, hardly suggests a weakness in the arbitral process. The Board failed to note the reason behind this omission in the proposed Act:

> "The power of subpoena is really unnecessary, as experience shows, and to introduce it would be to

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38. *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, *supra*, at 581.

39. Ibid.

invite difficulties in the form of an attempt. . . to harass an opponent by 'fishing' for documents.'"[40]

Finally, it should be noted that the Board's professed doubts of inadequate subpoena power are divorced from the facts in the instant case. Illinois, where the grievances herein arose, has adopted the Uniform Arbitration Act granting arbitrators the power of subpoena.[41]

The Board and the Union have also suggested that arbitration is in dire need of help from the Board. Professor Fleming was cited again in support of this proposition, but what Professor Fleming stated was that while complaints had been directed against the arbitration process, that process "must surely go down in history as one of democracy's most successful experiments in private self-government."[42] No further defense appears necessary in view of this Court's declaration of utmost respect for arbitration as a process and arbitrators as individual problem solvers.

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40. Challenges to Arbitration, Proceedings of the Thirteenth Annual Meeting National Academy of Arbitrators, p. 164 (BNA 1960). Professor Fleming makes the same observation in the opus cited by the Board in its brief:

> ". . . But this is not a serious handicap—as is evidenced by the fact that the proposed United States Arbitration Act, drafted by a committee of the National Academy of Arbitrators, does not even include such a provision. Neither side is inclined to withhold a genuinely relevant document because to do so invites an adverse ruling arising partly out of the arbitrator's inference that the document is damaging to the party withholding it."

(FLEMING, THE LABOR ARBITRATION PROCESS, p. 175 (Univ. of Ill., 1965)).

41. "The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence . . . Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in civil cases." Ch. 10 ILL. STATS. ANN. § 1007(a) (Smith-Hurd, 1966).

For an example of how this procedure has been utilized in preparation for a hearing on the merits of a grievance, see *Automatic Electric Co.*, 42 Lab. Arb. 1056 (Arb. John F. Sembower, 1964).

42. FLEMING, *op. cit. supra, at pp.* 222-23.

Furthermore, the use of the Board's processes as an alternative forum for resolving matters incidental to the arbitration hearing must necessarily result in the fractionalization of disputes. As this Court noted in its *Wiley* decision:[43]

> ". . . It would be a curious rule which required that intertwined issues of substance and procedure growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result."

The Board's final rationalization in attempting to justify its invasion of the field of contract administration is that discovery proceedings in a court are extremely broad, so should they be in a grievance procedure. This attempt to impose a principle of adversary litigation upon a continuing bargaining relationship is indicative, in our opinion, of the Board's failure to grasp the significance of the labor contract relationship.[44] Moreover, the analogy is further imperfect in that in a discovery proceeding, the tribunal before which the matter is to be heard determines relevance.

CONCLUSION.

Can it be possible that an employer is guilty of refusing to bargain in good faith because he fails to tell the union representing his employees where he disposed of a piece of equipment last used eight years ago?

Can it be possible that an employer is guilty of an unfair labor practice by failing to advise the Union where

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43. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 557 (1964).

44. Note in this regard this Union's grievance claim that it wished to bargain about equipment changes, in face of the previously agreed upon bargain set forth in Section 10 of Article VI.

certain equipment has gone when new equipment already has been obtained to replace it?

Can it be possible that an employer is guilty of violating the federal labor law by failing to give the Union information its officials have stated they already have?

Can all of these violations be found under the guise of administering a labor contract? The Labor Board says yes, but for the reasons set forth in this brief, we respectfully submit that the answer must be NO.

As Professor Woolett stated in his article: *The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction,* 10 Lab. L. J. 477, 478 (1959):

> "If the Board does not respect the integrity of the private arrangement by eschewing the exercise of a competing jurisdiction, it may corrupt the mechanism by opening up an alternative forum to the recalcitrant party, who may run to the Board with his complaint, rather than resort to the agreed-upon procedure."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1966.

National Labor Relations Board, Petitioner, *v.* Acme Industrial Co.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 9, 1967.]

Mr. Justice Stewart delivered the opinion of the Court.

In *NLRB* v. *C & C Plywood, ante,* p. —, decided today, we dealt with one aspect of an employer's duty to bargain during the term of a collective bargaining agreement. In this case we deal with another—involving the obligation to furnish information that allows a union to decide whether to process a grievance.

In April 1963, at the conclusion of a strike, the respondent entered into a collective bargaining agreement with the union which was the certified representative of its employees. The agreement contained two sections relevant to this case. Article I, § 3, provided, "It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work . . . ." In Art. VI, § 10, the respondent agreed that "[i]n the event the equipment of the plant . . . is hereafter moved to another location of the Company, employees working in the plant . . . who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement cover-

ing . . . employees at such location." A grievance procedure culminating in compulsory and binding arbitration was also incorporated into the collective agreement.

The present controversy began in January 1964, when the union discovered that certain machinery was being removed from the respondent's plant. When asked by union representatives about this movement, the respondent's foremen replied that there had been no violation of the collective agreement and that the company, therefore, was not obliged to answer any questions regarding the machinery. After this rebuff, the union filed 11 grievances charging the respondent with violations of the above quoted clauses of the collective agreement. The president of the union then wrote a letter to the respondent, requesting "the following information at the earliest possible date:

"1. The approximate dates when each piece of equipment was moved out of the plant.

"2. The place to which each piece of equipment was moved and whether such place is a facility which is operated or controlled by the Company.

"3. The number of machines or equipment that was moved out of the plant.

"4. What was the reason or purpose of moving the equipment out of the plant.

"5. Is this equipment used for production elsewhere."

The company replied by letter that it had no duty to furnish this information since no layoffs or reductions in job classification had occurred within five days (the time limitation set by the contract for filing grievances) prior to the union's formal request for information.

This refusal prompted the union to file unfair labor practice charges with the Board. A complaint was issued, and the Board, overruling its trial examiner, held

the respondent had violated § 8 (a)(5) of the Act[1] by refusing to bargain in good faith. Accordingly, it issued a cease-and-desist order. The Board found that the information requested was "necessary in order to enable the Union to evaluate intelligently the grievances filed" and pointed out that the agreement contained no "clause by which the Union waives its statutory right to such information."

The Court of Appeals for the Seventh Circuit refused to enforce the Board's order. 351 F. 2d 258. It did not question the relevance of the information nor the finding that the union had not expressly waived its right to the information. The court ruled, however, that the existence of a provision for binding arbitration of differences concerning the meaning and application of the agreement foreclosed the Board from exercising its statutory power. The court cited *United Steelworkers* v. *Warrior & Gulf Navig. Co.*, 363 U. S. 574, and *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, as articulating a national labor policy favoring arbitration and requiring the Board's deference to an arbitrator when construction and application of a labor agreement are in issue. We granted certiorari to consider the substantial question of federal labor law thus presented. 383 U. S. 905.

There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. *NLRB* v. *Truitt Mfg. Co.*, 351 U. S. 149. Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement. *NLRB* v. *C & C Plywood Co.*, *ante*, p. —; *NLRB* v. *F. W. Woolworth Co.*, 352 U. S. 938. The only real issue in this case, therefore, is whether the

[1] National Labor Relations Act, as amended, 61 Stat. 141, 29 U. S. C. § 158 (a)(5) (1964 ed.).

Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights under § 8 (a)(5).

The two cases upon which the court below relied, and the third of the *Steelworkers* trilogy, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, do not throw much light on the problem. For those cases dealt with the relationship of courts to arbitrators when an arbitration award is under review or when the employer's agreement to arbitrate is in question. The weighing of the arbitrator's greater institutional competency, which was so vital to those decisions, must be evaluated in that context. 363 U. S., at 567, 581–582, 596–597. The relationship of the Board to the arbitration process is of a quite different order. See *Carey* v. *Westinghouse*, 375 U. S. 261, 269–272. Moreover, in assessing the Board's power to deal with unfair labor practices, provisions of the Labor Act which do not apply to the power of the courts under § 301,[2] must be considered. Section 8 (a)(5) proscribes failures to bargain collectively in only the most general terms, but § 8 (d) amplifies it by defining "to bargain collectively" as including "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . any question arising [under an agreement] . . . ."[3] And § 10 (a)[4] provides: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be estab-

[2] Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (1964 ed.).

[3] Cf. *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 581: "The grievance procedure is, in other words, a part of the continuous collective bargaining process."

[4] 29 U. S. C. § 160 (a) (1964 ed.).

lished by agreement, law or otherwise: . . . ." Thus, to view the *Steelworkers* decisions as automatically requiring the Board in this case to defer to the primary determination of an arbitrator[5] is to overlook important distinctions between those cases and this one.

But even if the policy of the *Steelworkers Cases* were thought to apply with the same vigor to the Board as to the courts, that policy would not require the Board to abstain here. For when it ordered the employer to furnish the requested information to the union, the Board was not making a binding construction of the labor contract. It was only acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. This discovery-type standard decided nothing about the merits of the union's contractual claims.[6] When the respondent furnishes the requested information, it may appear that no subcontracting or work transfer has occurred, and, accordingly, that the grievances filed are without merit. On the other hand, even if it appears that such activities have taken place, an arbitrator might uphold the respondent's contention that no breach of the agreement occurred because no employees were laid off or reduced in grade within five days prior to the filing of any grievance. Such con-

[5] See *Sinclair Refining Co.* v. *NLRB*, 306 F. 2d 569, 570 (C. A. 5th Cir.).

[6] Cf. 4 Moore, Federal Practice, ¶ 26.16[1], 1175–1176 (2d ed.):

"[I]t must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial. . . . Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy."

Id., at 1181:

"Examination as to relevant matters should be allowed whether or not the theory of the complaint is sound or the facts, if proved, would support the relief sought."

clusions would clearly not be precluded by the Board's threshold determination concerning the potential relevance of the requested information. Thus, the assertion of jurisdiction by the Board in this case in no way threatens the power which the parties have given the arbitrator to make binding interpretations of the labor agreement.[7]

Far from intruding upon the preserve of the arbitrator, the Board's action was in aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim.[8] The expense of arbitration might be placed upon the union only for it to learn that the machines had been relegated to the junk heap. Nothing in federal labor law requires such a result.

We hold that the Board's order in this case was consistent both with the express terms of the Labor Act and with the national labor policy favoring arbitration which our decisions have discerned as underlying that law. Accordingly, we reverse the judgment and remand the case to the Court of Appeals with directions to enforce the Board's order.

Reversed and remanded.

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[7] This case, therefore, differs from *NLRB* v. *C & C Plywood Corp.*, *ante*, p. —, where the Board's determination that the employer did not have a contractual right to institute a premium pay plan was a determination on the merits. See *C & C Plywood*, *ante*, at 5, and n. 10.

[8] See *Fafnir Bearing Co.* v. *NLRB*, 362 F. 2d 716, 721:

"By preventing the Union from conducting these studies [for an intelligent appraisal of its right to grieve], the Company was, in essence, requiring it to play a game of blind man's bluff."